







**INTERNATIONAL LAW  
AND THE GREAT WAR**





# INTERNATIONAL LAW AND THE GREAT WAR

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## PREFACE

My aim in the present work is to give a systematic account, from the point of view of international law, of most of the questions and incidents that have so far arisen in the Great War.

Since the beginning of last August international law has been subjected to severe trials. I have endeavoured to ascertain to what extent it has emerged from its ordeals inviolate, to what extent homage has been honourably paid to it, in what respects it has suffered hurt and its behests have been disregarded. The number of violations that we have to examine is large. Indeed, so many have been committed, that it seems as though the whole fabric of international law has been demolished, and the sacred law of humanity—to which it is indissolubly joined—rejected and spurned. But, happily, not all the belligerents have contributed to bring about this deplorable result. For we shall find that nearly all the infractions of law are to be laid to the account of Germany.

It is obvious, therefore, that in an undertaking of this kind I must necessarily pay considerable attention to the theories of the law of war and of international law in general advanced by German writers, to the views held in German military circles, and, especially, to the practices of the German forces in this unparalleled conflict. I have tried to show, by referring to earlier examples and proceedings, that these theories, views, and practices were not suddenly adopted on this present occasion in order to justify and ensure the attempted realization of a certain object, but that they are, rather, the natural consequences of the general attitude that has long been assumed by

the governing authorities and militarist enthusiasts of Germany. I have examined the conduct of the German forces both on land and on sea; I have analysed it out so as to enable us to consider its constituent elements in relation to the provisions laid down by the conventional and the customary law of nations; and thus I have indicated wherein the established law was observed or violated. Where, in any particular circumstances, there were no definite rules of international law to invoke, and where the German authorities have sought to show that their rigorous and "frightful" measures were permissible on the ground that this or that Convention was not previously ratified, or that some minor belligerent was not a party to it, or that some reservation had been made at the Hague Conference, I have none the less applied the fundamental principles underlying the whole structure of the law of nations and have considered whether the excuses alleged were tenable and the defended actions legitimate.

Despite the numerous breaches of international law that have been committed, we need not despair of its future. Those who have traced its course of development, who have noted its trials and tribulations, its failings and its triumphs, are sure that its inherent vitality will never, and can never be entirely destroyed, and are confident that, notwithstanding the many wounds inflicted on it during the war, it will arise again healed and invigorated, and will assume its inalienable dominion over the Society of States. Where there is life, where there is a nation, where there is a community of States there must be restraint, discipline, law. The existence of international law, then, is inevitable. Every infringement of it that is recognized as such implies its existence, its validity, and its applicability. The main problem to which men and nations should devote themselves is how to fortify it by such potent sanctions as will make its violation not merely dishonourable, but unprofitable to an offending member of the community of States.

COLEMAN PHILLIPSON.

INNER TEMPLE, March 19, 1915.

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## INTRODUCTION

INTERNATIONAL law is passing through a crisis. According to a common opinion it has come to an end. In view of the breaches of treaties, the avowal of doctrines subversive of all engagements between States, the use of cruel and hitherto forbidden means of warfare, the disregard of the lives, property, and rights of non-combatants, many observers think that the rules of international law, built up for centuries, have disappeared. Never true law, they are pronounced to be not even recognized morality; they are now no more than so many well-meaning counsels of perfection, certain to be ignored when they thwart, as they often must, the interests of belligerents. If that were indeed so, more would have been lost than battles could retrieve. A spiritual force of incalculable value, "a great and noble monument of human wisdom," to quote Mr. Gladstone's words, "founded on the combined dictates of experience, a precious inheritance bequeathed to us by the generations that have gone before us," would no longer exist; and the world would have travelled a stage back to barbarism. •

• That judgment is common, but it is, I believe, erroneous. It rarely comes from those best acquainted with the history of international law. It is no more true than was a similar judgment often expressed during the anarchy of the Napoleonic wars. It does not take note of the fact that the contraventions of international law have chiefly been by one



of the belligerents. It makes too much of recent events and too little of the necessities of human intercourse, out of which those rules grew, and which will survive this war.

Those who declare that international law is dead generally confuse two sets of facts. The Germans have broken treaties and conventions because it suited them; military necessity has been to them an excuse for any excesses. They have made war more brutal than it has been for centuries. All this is retrogression; the exhibition of the presence of a spirit of barbarism which "culture" and industrial efficiency have not mitigated. But there is another set of facts not to be confounded with these. There have been breaches of the old rules ascribable to the altered conditions of warfare; to changes on land and at sea; to new methods of attack and defence; to the use of new weapons and munitions; to the altered relations of combatants to non-combatants and of belligerents to neutrals; to changes in trade; to the introduction of steam and the increased size of vessels; and to greatly heightened facilities for the conveyance by railways of goods from one country to another. With mines and torpedoes as weapons, with an increasing number of articles used both in war and in industry, with the readiness with which goods really intended for the armies or navies of belligerents can be conveyed to their destination by way of neutral ports, rules as to many points, notably contraband and continuous voyage, must change. No matter what was the temper of the belligerents, the changes in war and industry could not fail to produce some strain in the relations of belligerents and neutrals and a revision of old rules. There has been an appalling reversion to barbarism; there has also been growth, rapid, unexpected, and still incomplete.

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In forming a judgment as to the present situation, and in

forecasting the future, these two sets of facts are, as far as possible, to be separated; and no one, so far as I know, has attempted this task with the same care, impartiality, and knowledge as Dr. Coleman Phillipson in the book to which I have been asked to append a preface. It has been truly there said that more questions have arisen in the course of this war than in the whole Napoleonic contest. Many writers have dealt with some of such questions. There was needed a work in which they should all be calmly reviewed, not as isolated matters, but in their connection. This book is a history of the legal aspects and incidents of the war, and much more. It is an acute analysis of the causes of the war. It is a criticism, based on wide reading and much thought, of existing rules; and Dr. Phillipson's book will, if I mistake not, be consulted with profit when the time comes, as it must, for a revision of them in the light of the searching experience of this war.

He is hopeful as to the future of international law, despite the many breaches of it. The closing paragraph of his preface bids us not despair as to it. "Its inherent vitality will never, and can never, be entirely destroyed." His last chapter predicts that "with the conclusion of peace a brighter day will surely dawn for it." He shows that its rules rest upon the permanent necessities of intercourse between nations. The arguments for the supremacy of military necessity over all other considerations are not new, though there may be some novelty in the cynicism with which they are now often avowed. They are, in substance, stated by Thrasymachus in the "Republic" and by Callicles and Polus in the "Gorgias" as plausibly as by Nietzsche, Bernhardt, Treitschke or the German General Staff. They have been tried, and the experience of the world is against them. In the long run brute force proves weaker than ideals. Even the most successful conqueror finds that he

must pay homage to them. Principles, good enough for the carnivora, prove unsuitable for human beings.

Dr. Phillipson has some interesting observations upon the future line of evolution. Whether he is right in stating that "the nations of the world must necessarily be bound together more closely by some kind of federal system, subject to a reinvigorated federal law that shall be fortified by sanctions more authoritative and more potent than those which have hitherto been applied to safeguard the law of nations"; whether future Hague Conventions will "be so fortified and their sanctions made so strong through the jurisdiction of a world tribunal that the evil consequences following their violation will outweigh the gains expected from their breach"; whether force in some form is to be used to give effect to international law—all these questions, now pressing upon many minds, I do not examine. I see difficulties in drawing, as so many projects of reform now put forward purport to draw, between Europe and the rest of the world a sharp distinction. *Sittlichkeit* does not vary geographically. We in this country stand nearer to the United States than to certain European countries. Further, China and Japan are likely to count for more and more in the history of the world, and in the determination of questions of peace and war. Besides, experience does not encourage much belief in the accuracy of predictions, or the practicability of schemes, as to "the organization of the world," which goes its own way, and one that has many incalculable turnings and windings.<sup>1</sup>

International law is not dead. But Dr. Phillipson will convince his readers that it is signally incomplete in many respects, of which I mention only one or two. First as to

<sup>1</sup> "*Il est des hochets pour tout âge; l'amour pour les adolescents, l'ambition pour l'âge mûr, les calculs de la politique pour les vieillards.*" —Frederick the Great, "*Mémoires de 1763 jusqu'à 1775,*" *Œuvres*, vi. 72.

the position of neutral States. What is their duty when conventions to which they are parties have been violated? Are they to be silent when the violations do not directly affect them? Are they to leave the condemnation of such conduct to newspapers and private individuals? The Governments which treat conventions as "scraps of paper" claim to be above rules which bind private individuals who enter into agreements. But are neutral States bound to do less than such individuals would do in case of breaches of private agreements? It seems to me that neutral Governments have not merely the right but the duty to condemn violations of conventions & well established international usages. Dr. Phillipson would go further. "The entire world has, properly, a right to consider whether an alleged grievance is a justifiable and sufficient cause for making war. It has, further, a right to intervene when the alleged cause is unfounded, and to do its utmost to prevent the commencement of contemplated hostilities, or their continuance if they have already begun." He agrees with Dr. Charles Eliot that "some adequate force must be behind an international Supreme Court, as it always is behind every other Court, otherwise it may be feared that the Court will not command in practice the confidence of civilized mankind."<sup>1</sup>

I shrink from the consequences of these proposals, which, it is right to admit, events since August last have induced many persons to espouse. I fear that they might lead to more wars than they stopped. But if there is to be no Armed Neutrality—if that means frequent interventions with consequent hostilities, and is therefore to be deprecated—there should, if possible, be Organized Neutrality; every neutral State claiming the right to express, if practicable, in concert with others, the condemnation of conduct

<sup>1</sup> *The Road Towards Peace*, p. 25.

abhorrent and detrimental to all; the world never again seeing foul deeds done without protests from Governments looking on. It is not minding one's own business to be silent about matters of supreme importance to all, as are conventions and usages flagrantly violated.

"A neutral (State)," says Dr. Phillipson, describing an obligation sometimes of late forgotten, in words apt and precise, "having signed a convention, impliedly, if not expressly, undertakes to protect it, and do everything possible to secure its observance by other States, especially so at a time when there is a temptation to set it aside. Neutrality does not mean standing aside, and contemplating with apparent indifference wanton contraventions of that law which the neutral has helped to establish. A breach of neutrality is primarily, no doubt, an offence against the State whose territory has been violated; but it is also, even if it be so secondarily, an offence to every neutral. It may be that neutrals tacitly, and in their conscience, condemn such unprincipled disregard of established law; but the silent manifestations of their conscience and their tacit condemnation do not amount to a proper fulfilment of their legal duty."

There is a recognition, full of promise, admirable, if somewhat belated, of these principles in the United States Note of protest in the name of "the rights of humanity" and justice against the crimes committed on the high seas by German vessels of war.

The evolution of international law has been for a time checked by this war. But this book, with its calm survey of the present situation and its hopeful spirit, leads one to believe that there may be an onward impulse when the struggle is over, and when there is time for all concerned to reflect upon its causes.

A great change for the better is not likely to come while certain obstacles not to be removed by new conventions or any mere new machinery bar the way. Before the war broke out, within the borders of most nations were unrest, racial antipathies, unsatisfied covetousness, anarchical passions,

false ideals of national greatness; and all these, overflowing frontiers, could not fail to disturb the relations of States. Out of the inner life of a nation comes its foreign policy, and I do not see how that can be stable while within are the elements of discord and aggression.

A second obstacle. Here, too, though not so much as elsewhere, has been taught the doctrine that the State may do what seems good to it as between itself and its subjects; that there is no limitation of its legitimate activity. It is but a natural continuation or expansion to hold that the modern State is a sort of super-State; that it may do what it thinks fit between itself and other States; that it is outside or above the region of morals; that "the State is self-sufficient"; that its maintenance justifies any conduct, and is "superior to every moral rule." It is hard to believe that while this doctrine of national egotism—"Neo-Machiavellianism," as the late Henry Sidgwick called it—is widely believed, the basis of international law can be stable. Much the same things were once said, with perhaps as much truth, about the family, the sept, the clan, the tribe, out of which the modern State grew. Each of these groups was at a certain stage of society believed by most of its members to be above any rules which were in conflict with its interests; and the results were feuds and private warfare, the ancient counterparts of the gigantic modern wars.

This latest war, greater than any before, challenging and subverting so much which has passed unquestioned, compels the student of international law not to despair, but to dig deeper for its foundations. Some dubious matters may be cast out from the books. There may be less reliance than there has been upon conventions without adequate provision for their performance or the punishment of those responsible for breaches of them.

The work done at the Hague and London Conferences will need revision in the light of the experience of the past ten months. There will remain a core of sound doctrine. Far from destroying International Law, the ultimate effect of this war may be to strengthen it.

JOHN MACDONELL.

# INTERNATIONAL LAW AND THE GREAT WAR

## CHAPTER I

CAUSES OF THE WAR FROM A LEGAL POINT OF VIEW—  
TREATY OBLIGATIONS—PROTECTION OF PUBLIC LAW—  
DUTY OF THE GUARANTORS OF BELGIAN NEUTRALITY

THE universal sense of mankind recognizes that in the present state of civilization peace is the normal condition of the world's peoples and war is the abnormal condition. Considering the development of international relationships and the modern organization of the society of nations, it is felt that differences which arise may be settled by the various established methods of diplomacy and negotiation, or by means of arbitration; and failing these, it is considered that war is the *ultima ratio*, the final remedy, the very last resource of States for securing their self-preservation and independence, or for enforcing some other fundamental rights. The interests of each country being now so closely allied to those of others, it is incumbent on the Government of any aggrieved State to hesitate long before resorting to hostilities. From the point of view of international morality, and having regard also to the very spirit and significance of customary and positive international law, no State is entitled, through pique or ambition or on allegations that have not been definitely proved, to disturb the peace of the world by taking violent measures against another member of the family of nations. The entire world has, properly, a right to consider whether an alleged grievance is a justifiable and sufficient cause for making war. It has, further, a right to



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intervene when the alleged cause is unfounded, and to do its utmost to prevent the commencement of contemplated hostilities, or their continuance if they have already begun.

Without attempting to analyse out the various factors—political, economic, social, religious, psychological—that underlie the causes of war, as related by history, we may say that modern wars have been due to one or more of the following causes and motives: the desire to achieve political independence, to attain a more complete nationality, to crush revolutionary movements, to protect oppressed peoples, to acquire social or political influence in certain parts of the world, to obtain new fields for purposes of colonization and commercial intercourse, to conquer and annex other countries, to seek due reparation for injuries suffered, and, lastly, to preserve the existing autonomy and the indispensable rights and privileges of a State.

Nowadays the question whether war is to be held just or unjust is one that concerns not only the sphere of international ethics, involving the recognition of the moral conscience of humanity, with its inevitable distinction between good conduct and bad; it concerns also the domain of international law, involving the recognition of the juridical consciousness of mankind, with its inevitable distinction between right conduct and wrongful. Accordingly the world at large, constituted as it now is—its elaborate State-system composed of independent and yet in many respects interdependent units, its consciousness of the necessity of order and stability—cannot but admit that only those wars are justified that are made for reasons of self-defence and self-preservation. Now this fundamental principle must be interpreted fairly and impartially. We obviously apply it when we take up arms to repel an invader; likewise we rightly invoke it when we commence hostilities against a country for its violation of an undertaking, whereby the security of the established system is jeopardized and our own welfare and existence endangered; similarly we rely on it when we go to the protection of a State whose independence we have guaranteed, because we realize that,

should contractual obligations, which have been solemnly and deliberately entered into, be liable to repudiation at the pleasure of this or that contracting party, the existing State-system might be seriously injured, and the security and independence of States radically impaired. It is clear, then, that the right of intervention is a corollary which follows inevitably from the natural and self-evident rights of independence and self-preservation.

With these considerations before us, let us examine briefly why we were forced to go to war. If we consider mainly the cause of Great Britain in reference to the grounds of the war, it will simplify our investigation, and illustrate equally well the implication of rules and doctrines of international law. And it is the writer's intention to show and emphasize throughout that this international law is law in a true and worthy sense, despite arrogant and capricious denials in some quarters. The following chapter will deal with this question more particularly.

In the first place, then, our cause was perfectly just when we took up arms to prevent undue aggrandizement on the part of Germany, whose long contemplated intentions were none too well concealed. For, to stand by and allow an aggressive country to subjugate one State and humiliate another—an object she might probably have succeeded in accomplishing by reason of her vast military and naval preparations—would certainly have been inconsistent with our obligations imposed upon us as a member of the "*societas gentium*," and especially so as a member of the older European state-system. To stand by and permit an inordinate preponderance in Europe of the aims, the counsels, the spirit of Prussian militarism, would be to permit the growth of an incubus on the very heart of Europe, and an increasing menace to public right, to the very existence of smaller States, to the fundamental status of a harmonious circle of nations. It is the duty of each State to do its utmost to preserve the common order, and to refrain from disturbing, by any methods not sanctioned by agreement or universally accepted law, the established

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relationship of States and existing conditions which prevail conformably to the principles of international law and international practice. This balance of power on the Continent, this European concert, it is vitally important to maintain. The welfare of all is concerned. Without such underlying harmony it were impossible for each country to promote an enlightened domestic policy, to establish definite foreign relationships, to achieve the highest and best development of national and international life. All States, great and small, advanced and backward, those placed in the vortex of European life and those removed to the ends of the earth, all necessarily recognize the existence of this universal family of nations, and cannot but admit that the very conception of it implies the maintenance of such order and stability as can everywhere be counted upon. Should any State, therefore, proceed to commit a breach of this order in pursuance of an object antagonistic to public law and international comity, its proceedings would constitute an international offence. But as there is no international police, all other States are justifiably entitled to intervene in order to prevent the consummation of this unlawful purpose.

Moreover, this right of intervention exists apart from any title secured by means of treaties. Gladstone thoroughly recognized and asserted it in 1870, when the neutrality of Belgium was endangered. All will admit that he was a pacific minister and a generous interpreter of national and international obligations. None the less he was ready to abandon his own pacific policy for the sake of safeguarding the independence of Belgium, which was then being wrongfully threatened. He declared to John Bright that it would not be either "safe" or "right" to stand by "with folded arms and see actions done which would amount to total extinction of public right in Europe." In another communication he emphasized that "we could not look on while the sacrifice of freedom and independence was in course of consummation." And then we find that his arguments are followed by their practical application, when he devises the best plan for despatching, as soon as possible,

20,000 men to Antwerp, just as we sent 10,000 to Canada at the time of the *Trent* affair. Not only was Gladstone actuated by the motive of preserving international right as established by treaty; he felt also impelled to take up his attitude in view—to use his own words—of “the common interest against the unmeasured aggrandizement of any Power whatever.” This principle he applied to the case of Belgium. “What is that country?” he exclaimed. “It is a country containing four millions or five millions of people with much of an historic past, and imbued with a sentiment of nationality and a spirit of independence as warm and as genuine as that which beats in the breasts of the proudest and most powerful nations. Looking at such a country, is there any man who hears me who does not feel that if, in order to satisfy a greedy appetite for aggrandizement, coming whence it may, Belgium were absorbed, the day that witnessed that absorption would hear the knell of public right and law in Europe? . . . We have an interest in the independence of Belgium which is wider than that which we may have in the literal operation of the guarantee. It is found in the answer to the question, whether, in the circumstances of the case, this country, endowed as it is with influence and power, could quietly stand by and witness the perpetration of the direst crime that ever stained the pages of history, and thus become participators in the sin.”

The principle of the balance of power mentioned above was definitely laid down in Europe in the middle of the seventeenth century by the Peace of Westphalia, 1648. Since then it has been continually reinforced by the growth everywhere of a national consciousness, by the clearer definition of State sovereignty, by the universal recognition of natural limitations imposed on the absolute independence of States—constituent members as they are of a comprehensive society—and also, though indirectly, by the extension of international jurisprudence. It is not, indeed, the outcome of an explicit positive rule of international law; it is rather an implicit principle essential to and underlying the existence and applicability of international law; and so it

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may well be conceived to constitute a vital element of the modern juridical system. We know how frequently this principle of balance of power has been insisted on in critical times of European history. It was emphatically declared at the Peace of Utrecht, 1713; it was the central pivot on which turned the deliberations of the Congress of Vienna, 1815; it played a leading part at the Congress of Paris, 1856; at the Conference of London, 1867; at the Congress of Berlin, 1878; it was likewise invoked in the cases of intervention on behalf of Turkey, 1886 and 1897; and it will undoubtedly be reinvigorated at the peace which will bring the present great war to an end. To restrain a dictatorial State, to put a check to contemplated encroachment on our neighbours, to preserve the equilibrium between the members of the circle, we are perfectly justified to intervene, and this on legal grounds as well as on political. And such right of intervention is conferred by what may be called the common law of nations as distinguished from the written law in the form of treaties and conventions.

Next let us see to what extent we could legitimately claim a right of intervention in pursuance of written law; or, from the reciprocal point of view, to what extent we were legally *bound* to intervene, whether we thought fit to do so or not. Here we are at once face to face with rights and obligations consecrated by solemn treaties. Let us first of all recall as briefly as we can the circumstances which led to the neutralization of Belgium, and the purport of the treaties entered into for that purpose.

Belgium was for a long time the unhappy object of her neighbours' jealousy and hostility. Her provinces had long lacked unity and cohesion. Various attempts made from the fourteenth to the sixteenth century to achieve this object failed. From the Treaty of Utrecht, which set up the Republic of the United Provinces and subjected Belgium to Spanish domination, slices of Belgian territory were repeatedly cut away. In 1648 the Treaty of Münster established the independence of Holland and the Dutch

monopoly of navigating the Scheldt.<sup>1</sup> Louis XIV frequently attacked the Belgian provinces, which were known in the seventeenth century as the Spanish Netherlands; but by the Treaty of Utrecht, 1713, between France and the United Provinces, Austria—then the chief rival of France on the Continent—acquired Belgium, which was therefore known in the eighteenth century as the Austrian Netherlands. More than once were Austrian sovereigns—for example, Maria Theresa and Joseph II—disposed to bargain away their new acquisition. The French Revolution destroyed the arrangement made by the Treaty of Utrecht. In 1792 the troops of the French Republic defeated the Austrians at Jemmapes, and annexed Belgium; but the following year they were beaten at Neerwinden, and were forced to evacuate the Belgian provinces, to which the Archduke Charles returned as Governor-General. In 1794, however, France was victorious over the allied forces of Austrians, English, Dutch, and Prussians, and established her dominion in Belgium. Eventually French aggression suffered a decisive check; and in 1814 Great Britain, Austria, Prussia, and Russia signed a protocol for effecting the union of Belgium with Holland under the provisional government of the Prince of Orange. At the Congress of Vienna, 1815, the Kingdom of the Netherlands was thus created, with the view that it might constitute an effective barrier as between Germany and France. But the experience of the next fifteen years showed that this was an unsatisfactory union, and the Belgians rose in revolt against the House of Orange. The King of the Netherlands requested the mediation of the Great Powers; and as the peace of Europe was concerned they insisted on intervention. After various expedients had been discussed in vain, the five Great Powers agreed, in the interests of European stability and balance of power, to establish the independence of Belgium and make her a permanently neutral State.

In November 1830 plenipotentiaries of the five Powers met in conference in London, and in the following

<sup>1</sup> See *infra*, Chap. XVI.

January the principle of Belgian independence was definitely laid down in a protocol: "La Belgique formera un État perpétuellement neutre. Les cinq Puissances lui garantissent cette neutralité perpétuelle, ainsi que l'intégrité et l'inviolabilité de son territoire dans les limites mentionnées ci-dessus." "Par une juste réciprocité la Belgique sera tenue d'observer cette neutralité envers tous les autres États et de ne porter aucune atteinte à leur tranquillité intérieure ni extérieure." In June the preliminaries of a treaty of peace were proposed to Belgium and Holland, in a project known as "The Treaty of the Eighteen Articles," which stipulated the neutrality of Belgium as the essential condition upon which the Powers were prepared to recognize her national existence and autonomy. The main relevant articles run thus: "Article 9. La Belgique, dans ses limites telles qu'elles seront tracées conformément aux principes posés dans les présents préliminaires, forme un État perpétuellement neutre. Les cinq Puissances, sans vouloir s'immiscer dans le régime intérieur de la Belgique, lui garantissent cette neutralité perpétuelle, ainsi que l'intégrité et l'inviolabilité de son territoire dans les limites mentionnées au présent article." (Belgium, within the limits marked out in conformity with the principles laid down in the present preliminaries, shall form a perpetually neutral State. The five Powers, without wishing to intervene in the internal affairs of Belgium, guarantee her that perpetual neutrality as well as the integrity and inviolability of her territory within the limits mentioned in the present article.) "Article 10. Par une juste réciprocité, la Belgique, sera tenue d'observer cette neutralité envers tous les autres États et de ne porter aucune atteinte à leur tranquillité intérieure ni extérieure, en conservant toujours le droit de se défendre contre toute agression étrangère." (By just reciprocity Belgium shall be bound to observe this same neutrality towards all the other States, and to make no attack on their internal or external tranquillity, whilst always preserving the right to defend herself against any foreign aggression.) "Article 18. Ces articles, réciproquement adoptés, seront convertis en traité définitif."

But no definitive treaty was arrived at. The "Eighteen Articles" were accepted by Belgium, but rejected by Holland, which recommenced hostilities. Further negotiations followed in August, as a result of which the Conference submitted a new draft of a Treaty—the "Twenty-four Articles"—which was signed in London, November 15, 1831. Belgian territory once more suffered a substantial diminution. Article 7 is to this effect: "La Belgique, dans les limites indiquées aux articles 1, 2, et 4, formera un État indépendant et perpétuellement neutre. Elle sera tenue d'observer cette neutralité envers tous les autres États." (Belgium, within the limits specified in Articles 1, 2, and 4, shall form an independent and perpetually neutral State. She shall be bound to observe such neutrality towards all other States.) "Article 25. Les cours d'Autriche, de France, de la Grande-Bretagne, de Prusse, et de Russie garantissent au roi des Belges l'exécution de tous les articles qui précèdent."<sup>1</sup>

Owing to the dissatisfaction of the Dutch Government, negotiations took place once more; and on January 23, 1839, the Conference submitted for the acceptance of Holland and Belgium a project for effecting their separation. Article 7 of this definitive treaty says: "Belgium within the limits defined in Articles 1, 2, and 4, shall form an independent and perpetually neutral State. She is obliged to preserve this neutrality towards all the other States."<sup>2</sup> On the following April 19 the treaty between Holland and Belgium repeated the clause as to Belgian neutrality; and on the same day the articles were placed under the guarantee of the five Powers in a treaty concluded between them and Holland, and in another concluded between them and Belgium.

Apart from all these provisions, which were arrived at with due deliberation and solemnity, Belgium, as neutral territory, would have been, like any other neutral State, in

<sup>1</sup> The whole treaty will be found in Hertslet, *Map of Europe by Treaty*, vol. ii. pp. 979-98.



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view of a contemplated war between other Powers, obliged to observe the various duties of neutrality in conformity with the established law of nations. The treaties described above emphasized, intensified, sanctified these duties, and introduced in addition to the already existing sanction of international law a special sanction, proceeding from the conclusion of international treaties. Thus, these rights and obligations of Belgium were secured and guarded by a three-fold force—that of the unwritten common law of nations, that of the written conventional law of the fifth Convention of the Hague Conference (1907) stipulating the inviolability of neutrals, and finally that of treaties signed expressly for the same purpose.

Belgium has always faithfully and strictly fulfilled her duties; and, till the commencement of the present war, she has always enjoyed her rights. From time to time this or that Power might have benefited substantially by violating her neutrality; but until the year of grace 1914 the restraint imposed by law prevailed. Thus in 1870 Bismarck relied on the Treaty of 1839 to prevent England from favouring the French cause. He revealed a proposal, alleged to have been communicated to him in 1866 by Count Benedetti (who had been appointed French Ambassador at Berlin in 1864), which was to the effect that Prussia should aid France to acquire Belgium as a solatium for Prussian annexation in North Germany. England, recognizing her own duties and those of France and Prussia, insisted on the complete adherence to the neutralization treaty of 1839. Eventually Great Britain concluded (August 1870) treaties with Germany and France in identical terms, providing that, if either belligerent violated Belgian territory, she would support the other to preserve its neutrality. A striking incident, confirming the underlying obligations, occurred a month later after the battle of Sedan. The German General Staff requested Belgium to allow the passage of trains conveying wounded across her territory. France protested that, should this liberty be accorded, Germany might take advantage of it, and send

up men and war material to the front by routes thus set free. Accordingly, Belgium refused to grant the request.

For over a century it has been universally recognized that the passage of belligerent troops through any neutral territory whatever is forbidden. In the Declaration of November 20, 1815, which proclaimed the perpetual neutrality of Switzerland, and was signed at Paris by the representatives of Great Britain, France, Austria, Prussia, and Russia, it was expressly laid down that "no inference unfavourable to the neutrality and inviolability of Switzerland can and must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation." In 1870 Alsatian conscripts for the French army were not allowed to pass through Switzerland. There are, indeed, some instances in the last century in which States professing neutrality permitted the passage of troops; but such conduct was usually deemed by the aggrieved belligerent to be not only a serious breach of international law, but also a *casus belli*. The world had, in fact, come to think that no longer was it possible for any State, whatever overweening ambition it cherished, to recur to those unconscionable practices of the seventeenth and eighteenth centuries when a powerful belligerent would sometimes disregard the sovereign independence of a weaker country, and proceed according to the illegitimate maxim: "Those who are not with us are against us."

However, it was reserved for the year 1914 that a gross and deliberate infraction of neutrality should be committed by Germany—and this against a State not merely protected by the long-established law of nations, but against one whose neutrality was also specially guaranteed by Germany.

On Sunday, August 2, 1914, the German Minister in Brussels, without any previous negotiation or warning of such an unparalleled decision, presented an ultimatum to the Belgian Government, and requested a reply within twelve hours. It was to the following effect:—

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*"BRUSSELS, August 2, 1914.*

"The German Government has received positive information according to which French forces intend to march upon the Meuse by way of Givet and Namur. This information leaves no doubt as to France's intention to march upon Germany through Belgian territory. The Imperial German Government cannot help fearing that Belgium, in spite of her willingness to prevent this, may not be in a position to repulse, without assistance, a French movement of such proportions. This fact is sufficient evidence of a French attack directed against Germany.

"It is Germany's imperative duty of self-preservation to forestall this attack of the enemy.

"The German Government would greatly regret if Belgium should regard as an act of hostility directed against herself the fact that the steps taken by Germany's enemies oblige her, on her side, to violate Belgian territory.

"In order to avoid any misunderstanding, the German Government declares the following:—

"1. Germany does not contemplate any hostile act against Belgium. If Belgium—in the war which is imminent—will consent to adopt an attitude of friendly neutrality towards Germany, the German Government, on the other hand, promises that, when peace is concluded, it will protect the kingdom and all its possessions to their fullest extent.

"2. Germany promises, on the conditions set forth above, to evacuate Belgian territory as soon as peace is concluded.

"3. If Belgium preserves a friendly attitude, Germany declares herself ready, in concurrence with the authorities of the Belgian Government, to buy for ready cash everything necessary for her troops, and to indemnify Belgium for the damage caused in her territory.

"4. Should Belgium behave in a hostile manner towards German troops, especially by placing difficulties in the line of their march, or by resisting with the forts of the Meuse, or by destroying highways, railroads, and tunnels, or other

works, Germany will be obliged to consider Belgium as an enemy.

"In that case Germany will make no promises to the kingdom, but will leave to the decision of arms the regulation of the ultimate relations of the two States towards each other. The German Government is justified in hoping that this eventuality will not arise, and that the Belgian Government will take appropriate steps to prevent its arising. In that case the friendly relations of the two States will become closer and more lasting."<sup>1</sup>

On receipt of this communication, the Belgian Government replied to the "extraordinary and outrageous ultimatum" by the following Note, which was handed to the German Minister in Brussels on Monday, August 3rd, at 7 a.m.:—

"August 8, 1914.

"Under date of August 2, 1914, the German Government has announced that, according to positive information, the French intended to march upon the Meuse by way of Givet and Namur, and that Belgium, in spite of her willingness to prevent this, would not be in a position to repulse without assistance a forward march of French troops; that the German Government considered itself obliged to forestall this attack and to violate Belgian territory. Under these conditions Germany proposes to the King's Government to adopt towards her a friendly attitude, and promises, at the time when peace is concluded, to protect the integrity of the kingdom and its possessions to their fullest extent. The notification adds that if Belgium offers difficulties to the forward march of German troops, Germany will be obliged to consider Belgium as an enemy, and to leave to the decision of arms the regulation of the ultimate relations of the two States.

"This notification has profoundly and painfully astonished the King's Government.

<sup>1</sup> *The Case of Belgium in the Present War.* Presented to the United States by the Belgian delegates, September, 1914. (Result of an official investigation by a judicial commission. Reprinted in a pamphlet, 1914.) Pp. 5-6.

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“The intentions which she attributes to France are in contradiction to the formal declarations made to us under date of August 1st, in the name of the Government of the Republic.

“Moreover, if, contrary to our expectation, the country’s neutrality should be violated by France, Belgium would fulfil her international duties and her army would oppose a most vigorous resistance to the invader.

“The treaties of 1839, confirmed by the treaties of 1870, perpetuate Belgium’s independence and neutrality under the guarantee of the Powers, and especially under the guarantee of the Government of his Majesty the King of Prussia.

“Belgium has always faithfully observed her international obligations; she has fulfilled her duties in a spirit of loyal impartiality; she has neglected no opportunity to maintain her neutrality, and to cause it to be respected by others.

“The attack upon her independence with which Germany menaces her is a flagrant violation of the law of nations.

“No strategic interest can justify the violation of that right.

“The Belgian Government, by accepting the propositions mentioned, would sacrifice its national honour and betray at the same time its duty towards Europe.

“Conscious of the rôle which Belgium has played for more than eighty years in the civilized world, she refuses to believe that her independence can only be preserved at the price of a violation of her neutrality.

“If the Belgian Government be disappointed in its expectations, it is resolved to repulse by every means in its power any attack upon its rights.”<sup>1</sup>

The following morning, the Belgian Parliament was hurriedly summoned. The King then announced the intention of the Government to protect the integrity of its territory, and the country’s<sup>2</sup> autonomous existence, neces-

<sup>1</sup> *The Case of Belgium*, pp. 6-8.

sary for the equilibrium of Europe. At that very hour a German army, under General von Emmich, penetrated into Belgium. On the same day, Herr von Bethmann-Hollweg, the Chancellor of the German Empire, admitted in his speech in the Reichstag that the German invasion of Luxemburg and Belgium was contrary to the law of nations.

It is important to add that in the negotiations which took place prior to the declaration of war by Great Britain, the British Government asked both France and Germany whether they would undertake to respect Belgian neutrality so long as no other Power violated it.<sup>1</sup> The French Government gave on the same day a definite promise to that effect,<sup>2</sup> whilst the answer of Germany was characterized by an ambiguous reserve coupled with equivocal allegations as to the continued neutrality of Belgium.<sup>3</sup>

After the German ultimatum had been communicated to Belgium, the King of the Belgians appealed to King George for "diplomatic intervention to safeguard the integrity of Belgium."<sup>4</sup> The British Ambassador in Berlin was instructed to make a protest against the proposed repudiation of a treaty to which Great Britain as well as Germany were parties, and to obtain an assurance that the demand made upon Belgium would not be persisted in. At the same time Belgium was informed that her duty was obviously to resist German aggression by every means in her power, and that Great Britain on her part would fulfil her obligations by taking immediate proceedings to protect the independence and the integrity of the menaced neutralized State.<sup>5</sup>

In answer to the British protest, the German Foreign Secretary endeavoured once more to secure the non-intervention of Great Britain. He promised that his country would not under any pretext whatever annex Belgian territory, and declared that the German army was forced to

<sup>1</sup> *Correspondence*, No. 114. Sir E. Grey to Sir F. Bertie and Sir E. Goschen, July 31, 1914.

<sup>2</sup> *Ibid.*, No. 125, Sir F. Bertie to Sir E. Grey, July 31.

<sup>3</sup> *Ibid.*, No. 122, Sir E. Goschen to Sir E. Grey, July 31.

<sup>4</sup> *Ibid.*, No. 153, Sir E. Grey to Sir E. Goschen, August 4.

<sup>5</sup> *Ibid.*, No. 155, Sir E. Grey to Sir F. Villiers, August 4.

march through Belgium, because it might otherwise be exposed to a French attack across Belgium, "which was planned according to absolutely unimpeachable information."<sup>1</sup> In these circumstances it appears that the engagement of France to the British Government not to invade Belgium had been made four days before Germany's alleged knowledge that France intended to violate Belgian territory. In point of fact, even if France had wished, she could not safely have advanced through Belgium, for all her previous military preparations were of a defensive character, and her armies, had they proceeded through Belgium, would have been arrested by a strong line of German fortifications.

However, further negotiation was necessarily rendered impossible by the fact that on the same day Germany violated Belgian territory at Gemmenich, and consequently the British demand to respect Belgian neutrality became an ultimatum. "We hear that Germany has addressed Note to Belgian Minister for Foreign Affairs stating that German Government will be compelled to carry out, if necessary by force of arms, the measures considered indispensable. We are also informed that Belgian territory has been violated at Gemmenich. In these circumstances, and in view of the fact that Germany declined to give the same assurances respecting Belgium as France gave last week in reply to our request made simultaneously at Berlin and Paris, we must repeat that request, and ask that a satisfactory reply to it and to my telegram of this morning be received here by 12 o'clock to-night. If not, you are instructed to ask for your passports, and to say that his Majesty's Government feel bound to take all steps in their power to uphold the neutrality of Belgium and the observance of a treaty to which Germany is as much a party as ourselves."<sup>2</sup>

The German Chancellor expressed his astonishment at

<sup>1</sup> *Correspondence*, No. 157, German Foreign Secretary to Prince Lichnowsky (German Ambassador in London), August 4.

<sup>2</sup> *Ibid.*, No. 159, Sir E. Grey to Sir E. Goschen, August 4.

the importance attached by Great Britain to the "scrap of paper" of 1839. We may note that, apart from this particular "scrap of paper," Germany is also a party to the fifth Convention of the Hague Conference, 1907, which prohibits belligerents from violating neutral territory. She knew well that Belgium, as a neutralized State, was not empowered to grant the demand for free passage of troops. Consequently, in forcibly entering Belgian territory she was not, under established law, a "just" belligerent; and her invasion was not an "act of war," but a flagrant offence against universally recognized international law.

That Belgium recognized her own duty to repel forcibly the violators of her neutrality and the obligation of her guarantors to come to her defence is shown in the following communication to the British Government (August 5): "The Belgian Government regret to have to inform His Majesty's Government that this morning armed forces of Germany penetrated into Belgian territory in violation of engagements assumed by treaty. The Belgian Government are firmly resolved to resist by all means in their power. Belgium appeals to Great Britain and France and Russia to co-operate as guarantors in the defence of her territory."<sup>1</sup>

Nor was Belgium diverted from her duty under the treaty of 1839 by the threats contained in the proclamation of General von Emmich, Commander-in-Chief of the German army on the Meuse, on his entering Belgian soil: "To my great regret the German troops are compelled to cross the Belgian frontier by inevitable necessity, the neutrality of Belgium having already been violated by French officers who crossed the frontier in disguise in motor-cars. Our greatest desire is to avoid a conflict between our peoples, who have hitherto been friendly and were formerly allies. Remember Waterloo, where the German armies contributed to found the independence of your country! But we must have a clear road. The destruction of bridges, tunnels, and railways will have to be considered hostile actions. I hope that the German army on the

<sup>1</sup> *The Times*, August 6, p. 8.



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Meuse will not be called upon to fight you. We want a clear road to attack those who wish to attack us. I guarantee that the Belgian population will not have to suffer the horrors of war. We will pay for provisions, and our soldiers will show themselves to be the best friends of a people for whom we have the highest esteem and the greatest sympathy. It depends on your prudence and patriotism to avoid the horrors of war for your country." <sup>1</sup> .

It is perfectly clear, then, that so far as Great Britain was concerned she was compelled to intervene. There was no other course open to her but to go to war, in order to fulfil her engagement under the treaty of 1839, to defend the public law of Europe and to vindicate public right, which was seriously jeopardized by the military pretensions of Germany and her avowed doctrines of self-aggrandizement. The Prime Minister well defined this public right and pointed out its legitimate implications. "It means, first and foremost," he said, "the clearing of the ground by the definite repudiation of militarism as the governing factor in the relation of States and of the future moulding of the European world. It means, next, that room must be found and kept for the independent existence and the free development of the smaller nationalities . . . ; they must be recognized as having as good a title as their more powerful neighbours, more powerful in strength and wealth—exactly as good a title to a place in the sun. And it means, finally, or it ought to mean, perhaps by a slow and gradual process, the substitution for force, for the clashing of competing ambition, for groupings and alliances, and a precarious equipoise, the substitution for all these things of a real European partnership, based on a recognition of equal right, and established and enforced by a common will."

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In some quarters doubts have been expressed as to the precise nature and extent of Great Britain's treaty obliga-

<sup>1</sup> *The Times*, August 6, p. 6.

tions to Belgium. In order to make it easier to examine this question, let us look for a moment at the position of Luxemburg. Luxemburg, like Switzerland and Belgium, is a permanently neutralized State, whose neutrality was guaranteed by the Powers of Europe in a formal treaty. Since 1815 the Grand Duchy was in union with the Netherlands as a separate and independent State, but was at the same time a member of the Germanic Confederation. Prussia garrisoned its capital with troops, who remained after the Confederation was dissolved in 1866. France demanded their removal, and the negotiations which followed threatened to precipitate war between that country and Prussia. Napoleon III endeavoured to acquire Luxemburg by purchase from the King of Holland, but the possession by France of a strong fortress in this locality Prussia refused to countenance. The neutralization of the Grand Duchy was then proposed. Accordingly, at the instance of Lord Stanley, then Foreign Secretary, a Conference was held in London in 1867, at which Great Britain, France, Austria, Prussia, Russia, Italy, Belgium, Holland, and Luxemburg were represented. On May 11 a treaty was signed which established the perpetual neutrality of Luxemburg, under the sanction of the collective guarantee of all the signatories (Belgium, herself a neutralized State, not being included).<sup>1</sup> A condition was added that Luxemburg must not maintain any armed forces, except police necessary for securing safety and order, and must not possess any fortresses—the existing fortress being required to be destroyed. Thus Luxemburg, unlike Belgium and Switzerland, was debarred from offering forcible resistance to invaders of her territory.

When Germany in the present war violated the neutrality of the Grand Duchy by bringing in armoured trains with troops and munitions of war, seizing the Government offices, and cutting the telephonic communication, the Imperial Chancellor informed the Luxemburg Minister of State that the military measures taken by the Germans

<sup>1</sup> Hertslet, *Map of Europe by Treaty*, vol. iii. p. 1808.

in Luxemburg were not intended to amount to a hostile act against the Grand Duchy; he declared that they were simply proceedings taken to protect the working of the railways connected with the German system against a possible attack by French troops, and that any damage done thereby would be afterwards made good by the payment of due compensation. Here we have obviously a deliberate breach of faith on the part of Germany, coupled with a cynical attempt to justify her illegal conduct. The attitude of France, on the contrary, was from the first in perfect accordance with her undertaking prescribed by the treaty in 1867. Thus the lame excuse offered by Germany constitutes an aggravation of the deliberate offence, in that it reveals an arrogant and contemptuous attitude towards established law. Moreover, the treatment of the Grand Duchess was not only contrary to all conceptions of sovereignty and international comity—it was downright infamous.

Now is the effect of the guarantee under the treaty of 1839 relating to Belgium the same as that under the treaty of 1867 relating to Luxemburg?

Article 2 of the treaty of 1867 says distinctly that the neutrality of Luxemburg is "placed under the sanction of the collective guarantee of the Powers signing." The crucial expression is "collective guarantee." Originally Bismarck proposed the phrase "the formal and individual guarantee of the Powers." The use of the word "individual" would obviously have imposed on the signatories a wider responsibility. To this Lord Stanley, the British Foreign Minister, objected on the ground that this country could not undertake an unlimited liability, whereby it might be called upon to come alone to the aid of Luxemburg if the other Powers concerned failed to fulfil their respective obligations. Accordingly, the phrase "collective guarantee" was suggested by the Russian representative and was accepted by all. Otherwise, as those holding Lord Stanley's view felt, in the event of war breaking out between France and Germany, Luxemburg

might well have been used as a means of dragging in Great Britain and possibly others among the remaining contracting parties. But by the arrangement deliberately arrived at the treaty gave us and each of the other guarantors—to use Lord Stanley's words—"a right to make war, but would not necessarily impose the obligation," should an attempt be made to violate the neutrality of Luxemburg.<sup>1</sup> Similarly, Lord Derby declared in the House of Lords in 1867, in a discussion respecting the obligations of this country under the same treaty: "In the event of a violation of neutrality all the Powers who have signed the treaty may be called upon for collective action. No one of these Powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability."<sup>2</sup> On the same occasion Lord Clarendon expressed his view, and discriminated sharply between the case of Belgium and that of Luxemburg: "If we had undertaken the same guarantee in the case of Luxemburg as we did in the case of Belgium, we should, in my opinion, have incurred an additional and very serious responsibility. I look upon our guarantee in the case of Belgium as an individual guarantee, and have always so regarded it; but this is a collective guarantee. No one of the Powers, therefore, can be called upon to take single action, even in the improbable case of any difficulty arising."<sup>3</sup> Finally, by way of confirming this view, authoritative and conclusive as it really is, let us refer to Lord Salisbury's statement, March 6, 1871. Speaking of Turkey, he pointed out that the guarantee declares: "'The High Contracting Parties guarantee jointly and severally the independence and integrity of the Ottoman Empire,' recorded in the treaty concluded at Paris on the 30th of March 1856. Your Lordships will notice the words 'jointly and severally'—they are very important words. In a discussion on a recent guarantee a short time ago [viz. the Luxemburg guarantee] it was shown that the

<sup>1</sup> Cf. Hansard, 3rd series, vol. clxxxviii. pp. 149, 967.

<sup>2</sup> *Ibid.*, vol. clxxxvii. p. 1922.

<sup>3</sup> *Ibid.*, vol. clxxxviii. p. 151.

guarantee was purely a joint one; that the execution of it would never be required unless all the parties who joined in it were prepared to join in executing it, and that as the parties who were to join in executing it were the only parties at all likely to break it, it did not involve much danger."

It is essential, therefore, to distinguish between a guarantee providing for a "joint" or "collective" liability, and one providing for a "separate," "several," or "individual" liability. The Luxemburg guarantee involves no more than a collective liability, so that a breach of the engagement by one guarantor does not necessarily demand the hostile intervention of the other guarantors. The other guarantors may, if they deem fit, interpose, but they are not legally bound to do so. This view was accepted by Sir Edward Grey, who reminded the French Ambassador of the "doctrine" as "laid down by Lord Derby and Lord Clarendon in 1867."<sup>1</sup> It is further to be noted that two of the co-guarantors of the Luxemburg treaty, namely Italy and Holland, who have not been otherwise dragged into the present war, did not think it obligatory on their part to take up hostilities because of the breach of the guarantee by Germany in violating the neutrality of Luxemburg. Nor did, indeed, Luxemburg make an appeal to the other signatory Powers for protection by force of arms; her Minister of State simply made a formal protest.<sup>2</sup> Of course, the German violation of her neutrality remains none the less a gross infraction of international law.

But what of the guarantee in the case of Belgium? As we have seen above, Lord Clarendon regarded this as imposing the wider kind of responsibility, namely joint and several. And we may say at once that this is undoubtedly the correct interpretation. It is true that, though the treaty of 1831 spoke of a guarantee by the Powers, the treaty of 1839 did not embody this expression. Notwithstanding a

<sup>1</sup> *British White Paper*, No. 148.

<sup>2</sup> *Correspondence*, No. 147; Minister of State, Luxemburg, to Sir Edward Grey, August 2.

certain vagueness in the latter treaty, and the inclusion in it of twenty-four articles involving political and financial adjustments consequent on the separation of Belgium from Holland, and other matters of detail whose non-observance could not possibly be regarded by any one as a *casus belli*, yet we must conclude, if we pay heed to the various circumstances, that the most essential element of the treaty, namely the protection of Belgian neutrality, was held to be fully guaranteed by the signatories. Mindful of her liability with regard to Belgium, Great Britain was careful to make it of less extent with regard to Luxemburg in 1867. Considering her geographical position in relation to these two States, how could she accept as wide a responsibility in the case of Luxemburg as in that of Belgium? Great Britain was always prepared to intervene by force of arms to protect Belgium, even if the other signatories repudiated or shirked their responsibility; for the position of Belgium, with a coast close to our own, is of vital importance to us; our own security and our own interests are involved in the maintenance of her neutrality—and the other contracting parties knew it, and signed accordingly. Treaties are not entered into for formality's sake, or without any intention to establish definite relationships thereby. Contracting parties deliberately and voluntarily signing an instrument do so with a view to their contemplated mutual interests.

Now the contracting parties have always looked upon the instrument of 1839 as implying a guarantee. Gladstone was ready to vindicate it by force of arms. It was accepted in the special treaty of 1870, when Bismarck undertook that the German Confederation and its allies would respect the neutrality of Belgium, and added that this declaration was, indeed, "superfluous, having regard to the treaties in force." In that treaty, Great Britain, in truth, defined specifically the amount of aid she was prepared to give one combatant in the Franco-Prussian War, in case the other invaded Belgian soil. This was not really creating a new obligation. It was, rather, a special application of the existing general obligation to particular circumstances; it was of the nature

of a special ratification of the old legal relationships which were still in existence. In fulfilment of the fundamental obligation, the particular application might legitimately be wider or narrower according to the nature of the interests at stake, and according to the initial development of events after the guaranteed neutrality was menaced or violated. If the guarantor could intervene quickly and prevent a breach of neutrality or readily expel the invaders, his essential undertaking would have been duly executed. But what if additional complications ensue, and other *casus belli* arise as between the guarantor and the violator of the treaty? Obviously the guarantor cannot then confine his operations merely to the territory of the guaranteed State—as provided in the arrangement of 1870—but must go beyond it, and do everything possible to obtain reparation for himself also.

Further, Belgium regarded the treaty of 1839 as a guarantee in the fullest sense, when she at once called on the signatory Powers to protect her. Moreover, Germany herself before commencing her hostilities did not disclaim the fact.

Hence, we may justly say that though the draftsmanship of the treaty of 1839 may have been defective, and though a strictly literal interpretation of its terms when read apart from the attendant circumstances may perhaps be made to lead to other conclusions, yet the long-established attitude of the Powers, the subsequent events, declarations, and distinctions have rendered the guarantee a living and potent reality, laying compulsory obligations on each and all of the contracting parties. Each party, no doubt, in an alleged case of violation of the protected neutrality, might hold itself free to decide whether or not there is a sufficient cause for forcible interference. But so far as Great Britain was concerned, intervention was necessary in order to fulfil her word of honour, to safeguard the public law of Europe, to protect her own interests, and to vindicate the rights of Belgium.

In concluding this chapter, it is important to emphasize that this violation of neutral territory concerns not only

the parties immediately involved in the war, that is the guarantors of the neutralization treaty, but also the rest of the world. Not to mention the customary international law on the subject, we may recall the words of the fifth Convention of the Hague Conference, 1907. Article 1 of this solemn treaty says: "The territory of neutral Powers is inviolable"; and Article 2 follows with the definite prohibition: "Belligerents are forbidden to move troops or convoys, either of munitions of war or supplies, across the territory of a neutral Power." This Convention was signed by over forty States. All intended that it should possess binding force, and that it should not be repudiated by any one on the alleged grounds of its self-interest or for any other reason. It is true that no specific condition as to intervention was postulated; but all Powers, being parties to the Convention, are undoubtedly responsible for its maintenance and due observance. Therefore the least that the other Powers could do—and they were legally entitled, nay obliged, to do it by reason of the juridical relationship created by the Convention—was to make strong remonstrances to those about to violate the neutrality of Belgium and Luxemburg, and to do their utmost in every possible manner to prevent a breach of that law to which they have voluntarily subscribed, and which they have expressly sanctioned. The said Convention bears the signature of the United States, and the United States is a leading Power possessing great influence in the world. She is, to be sure, far distant from the region of the war; but the Convention confers no exemption from responsibility on States far distant from the locality where a deliberate breach of its provisions has been committed. We hold, therefore, that she was bound legally—to say nothing of an undeniable moral obligation—to intervene, not necessarily by force of arms, but certainly with all the diplomatic force and all the powers of suasion at her command. Even forcible intervention would have been legally justifiable, had pacific measures failed to turn away the violators of neutrality from their career of crime against international law. A neutral



having signed a Convention impliedly, if not expressly, undertakes to protect it, and do everything possible to secure its observance by other States, especially so at a time when there is a temptation to set it aside. Neutrality does not mean standing silently aside, and contemplating with apparent indifference wanton contraventions of that law which the neutral has helped to establish. A breach of neutrality is primarily, no doubt, an offence against the State whose territory has been violated ; but it is also, even if it be so secondarily, an affront to every neutral. It may be that neutrals tacitly, and in their conscience, condemn such unprincipled disregard of established law ; but the silent manifestations of their conscience and their tacit condemnation do not amount to a proper fulfilment of their legal duty.

## CHAPTER II

### THE DOCTRINE OF NECESSITY AND INTERNATIONAL LAW

ON August 4 Herr von Bethmann-Hollweg, the German Chancellor, said in the course of his speech in the Reichstag: "We are now in a state of necessity, and necessity knows no law. Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for invasion. France could wait, but we could not wait. A French movement upon our flank on the Lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong—I speak openly—that we are committing we will endeavour to make good as soon as our military goal has been reached. Anybody who is threatened as we are threatened, and is fighting for his highest possessions, can have only one thought—how he is to hack his way through." <sup>1</sup>

On the same day Herr von Jagow, the Secretary of State, declared that Germany was "obliged" to violate Belgian neutrality—a neutrality which had been guaranteed by herself—in order to advance into France by the quickest and easiest route, and that this was "a matter of life and death" to her. To this declaration Sir Edward Goschen,

<sup>1</sup> *The Times*, August 11, p. 5.

the British Ambassador in Berlin, replied that it was also a matter of life and death to Great Britain to preserve her solemn engagement.

The Imperial Chancellor's pronouncement does not even make the possible invasion of Belgium by France as the essential reason why his country violated its undertaking and committed a deliberate breach of international law. The whole tenour of his speech is that of a political Faust, endeavouring to explain away his self-abandonment to an unholy policy. The alleged excuse is "necessity." And "necessity" has been erected by his nation, especially in its military sections, as a supreme deity in whose name justice and equity may be trampled upon, the weak and the defenceless crushed, the provisions of international law—inseparable from the world's civilization—set aside at pleasure. The argument of the Chancellor amounted to this—it was "necessary" for Germany to violate the neutrality of Belgium, therefore her conduct was justifiable; Germany does not commit a wrong, unless she has strong motives for doing so. As though any one possessed of his reason would commit a wrong without a motive! The German Chancellor also pointed out that his country would respect the neutrality of other States, such as Holland, Norway, and Sweden: no doubt he expected applause for such self-denial. In what sense is this position different from that of the criminal who urges justification for his crime against A in breaking into his house, on the ground that he does not intend to commit a like offence against B, C, or D. It is clear to the most unsophisticated person that the adoption of this pernicious view as between the States of the world would lead to nothing less than horrible chaos. No law of any self-respecting community can exculpate a criminal on the ground that his offence was committed under the stress of this or that motive. No law can countenance murder because the murderer hated his victim; no law can tolerate robbery because the robber desired to add to his material resources. No law can tolerate the plea of necessity, when the conduct involved

is directly contrary to the very behests of that law. The proceedings demanded by necessity must perforce fall within the provisions of the law. Necessity cannot properly override law. Should an unforeseen case of necessity arise that is of insuperable urgency, then the law should be modified in the manner prescribed or usually observed, in order that that particular case might be covered thereby—that is, if it is thought well to render legitimate the act sought to be done.

In truth, if we look closely into the proceedings of Germany against Belgium, if we bear in mind the various circumstances, her openly avowed, nay vaunted, militarist attitude, her constant preparations designed to attain the goal which she has long kept in view, if we carefully consider all these things we shall see that this invasion of a neighbouring country—whose neutrality she had engaged herself to protect—was not really a case even of an unforeseen necessity; it was, on the contrary, part and parcel of the long-conceived projects of her military authorities; it was an invasion deliberately planned, and constituted the first substantial step of an elaborately worked-out programme; it was not an unavoidable act of sudden emergency. A wrongful act committed suddenly without any deliberation, and under the stress of an unexpected occurrence, is not necessarily deprived thereby of its criminal character. How much more reprehensible is it when it is the result of a carefully excogitated scheme! The military leaders and militant historians of Germany have repeatedly laid down that in the next war it was incumbent on her to act on the offensive, and therefore to strike the first blow quickly. Her "offensive" programme was completely drawn up; it was, naturally, organized so that the strong line of French fortresses might be avoided. When she decided that the opportune moment had come to strike the first blow, she believed that this programme could not be altered without the risk of serious disorganization. Accordingly she flung aside solemn treaties and conventions, alleging "necessity" as an excuse.

But it was not necessity in the ordinary, intelligible, rational sense of the term; it was simply the existence of this previously prepared programme and the fear of endangering its sinister objects that seduced her from the path of law and justice.

Let us now examine this doctrine of necessity in relation to international law in general. (In a later chapter<sup>1</sup> we shall consider it also in reference to the law of war in particular.) (We must be careful here to discriminate sharply between the doctrine of necessity appertaining to the region of metaphysics, and the notion of necessity relating to the domain of practical life and legislation. We are not concerned with the controversies between determinists and their opponents, nor with the elaborate subtleties of the "objective" and the "subjective"—the cherished offspring of the German philosophical mind. We are concerned simply and solely with the conceptions and requirements of ordinary reasonable and honourable men of affairs—conceptions and requirements that are deemed by them to be fundamental in civic life and in international relationships.

In certain cases there may well be exemptions from responsibility for acts or omissions contrary to law. In English civil actions, for example, the plea of urgent necessity might be admissible as a defence. Similarly it might in certain circumstances operate to excuse particular acts otherwise falling within the sphere of criminal law. And such acts must have direct reference to the immediate demands of self-defence. It is in this sense that Hobbes emphasizes the *ius necessitatis*: "If a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation." That is, when there is no way of escape from an assailant, acts of self-defence resulting in the latter's death will fall within the class of justifiable homicide, provided that no more force was used by the person attacked than was necessary, that the attack could

<sup>1</sup> Chap. VIII.

not reasonably have been averted by anything less than the means adopted, and that the nature of the counter-attack was not more serious than that of the attack. Apart from this extreme case of self-defence, there can be no justification for an act of homicide. Thus in the well-known murder trial,<sup>1</sup> in which sailors were indicted for committing an act of cannibalism at sea, the defence of necessity was emphatically rejected by the Court, and the accused were convicted and sentenced to death. German law also permits a defence in certain circumstances covered by the expression "Notwehr," that is, briefly, such acts of self-defence as are absolutely necessary in order to avert an immediate unlawful attack.

These conceptions apply, in their fundamental significance, to the conduct of States towards each other—though, of course, as we are well aware, circumstances may arise in the case of interstate relationships which can have no precise parallel to those arising in the relationships between private citizens. However, with regard to the attack on Belgian neutrality, if Germany is to obtain exoneration on the plea of self-defence, she must prove at least that previous to her own hostilities French troops were already advancing through Belgium against her, and that Belgium was incapable of efficiently safeguarding her neutrality and expelling the invaders. But we have already seen in the preceding chapter that Germany could not prove this, and, moreover, that she really knew she could not prove it. The defence of "necessity" advanced by her is obviously different from that necessity related to justifiable self-preservation in the face of an unprovoked attack. In 1838 the United States Government declared—and their declaration commends itself to every civilized country—that in order to justify the violation of neutral territory it is incumbent on the violator to prove clearly that necessity of self-defence which is insistent, overwhelming, and which leaves no choice of means and no moment for deliberation. A necessity of this description Germany cannot establish.

<sup>1</sup> *The Queen v. Dudley and Stevens*, 14 Q.B.D. 278.

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Once the factitious and spurious kinds of "necessity" are admitted or even tolerated by the society of nations, all international law and comity become nugatory, all conventions and established institutions for regulating international dealings will prove futile. The maxim "Necessity knows no law" has reference only to that imperious necessity of self-preservation against lawless attacks; in reference to other cases it is no more than a colloquialism, a proverbial exaggeration unsupported by moral or legal grounds. To a responsible man and to a responsible State there cannot properly be any such thing as "necessity." It is a fetish appealed to by those seeking to shirk their responsibility. Necessity strictly permits of no alternative whatever. But to honourable men and to honourable States there is always an alternative—namely, to fulfil their duty, even though disadvantages ensue and a coveted object be forsworn. Indeed, have not laws, with their rights and obligations, been created for the very purpose of obviating all pleas of necessity and other excuses that might be urged to cover harmful conduct?

This doctrine of necessity is advanced by German writers and political and military leaders, who at the same time maintain the theory of State absolutism. In fact, the two ideas are inseparably connected with each other. What is this conception of State absolutism? To understand it will help us to realize the implications in the German theory of necessity. Let us, therefore, briefly examine it. We shall then also be able to see more clearly whether international treaties and international law in general—matters necessarily involved in the contentions of the German writers and leaders—can properly be said to have legally binding force.

The doctrines of State absolutism and militarism have been set forth by a number of German writers, including men like Jähns, Lasson, Treitschke, Frobenius, Von der Goltz, Delbrück, and Bernhardi. All these have inherited something of the point of view and spirit of Clausewitz, the so-called philosopher of war. At the beginning of the nine-

teenth century Frédéric Ancillon was professor of history at the Berlin Military Academy, and in 1803 he issued a work entitled "Tableau des révolutions du système politique de l'Europe depuis la fin du XV<sup>e</sup> siècle." He speaks in it of the virtues of courage and patience that are generated by war. "La guerre et les malheurs qu'elle entraîne à sa suite développent des vertus mâles et fortes ; sans elle le courage, la patience, la fermeté, la dévouement, le mépris de la mort disparaîtraient de dessus la terre." Clausewitz, who was born in 1780, and was from 1818 till almost his death in 1831 director of the Military School in Berlin, took up this central conception, and developed it in an elaborate manner, in reference to State policy, and made it the keynote of State aggrandizement. His book on war (*Vom Kriege*), at which he had worked from 1812 to 1830, remained unfinished, and was published in the year following his death, 1832. In many respects this work and the productions of his successors just mentioned resemble more or less Machiavelli's *The Prince*, though few of them possess the consistency and comprehensive political character of the production of the Florentine.

While glorifying the military profession Clausewitz emphasized the predominance of material interests.<sup>1</sup> He preached territorial expansion, which was to be carried out by deliberate aggression if need be. Like his successors, he looked with contempt on small and weak States. Thus Lasson holds that "a so-called small State is really no State at all, but simply a tolerated community, which in a ridiculous manner affects to be a State, without being capable of performing the most essential function of a State, namely to repel coercion by force."<sup>2</sup> The teaching of Clausewitz amounts to an apotheosis of the sword. War, in order to be effective, must not be hampered, he says, by the frequently proposed relaxations. Humanitarian considerations of mercy and compassion have no place in armed

<sup>1</sup> Cf. his pamphlet, *Die Verhältnisse Europas seit der Theilung Polens*.

<sup>2</sup> Lasson, *Kulturideal und Krieg*, p. 6.



State conflicts. "War is merely a continuation of politics carried out by other means"—it is an act of social life, a kind of intercourse differing from other human relationships in the greater shedding of blood. This pernicious principle is common to this school of writers. A State possessing "Kultur," says Jähns, must be ever ready to assume at an opportune moment an aggressive policy.<sup>1</sup> Von der Goltz observes: "The statesman who, knowing his instrument to be ready, and seeing war to be inevitable, hesitates to strike first is guilty of a crime against his country."

The events which led to the present war and the proceedings of the German armies seem to be practical applications of these doctrines of super-morality, professed by men who would be super-men, with the object of making their State a super-State. Everything is held to be permissible in the name of this State-Moloch. All obstacles lying in its way must be destroyed; everything impeding the fulfilment of its desires and the attainment of its ambitions must be brushed aside. Obligations and responsibility when found inconvenient must be unceremoniously repudiated. Any engagements it enters into must always be subject to the proviso, *rebus sic stantibus*; and it alone is entitled to determine whether and when the circumstances have changed sufficiently to permit it to abrogate its promise, without regard to the position and claims of the other contracting parties. International treaties can never be held to impose any absolute limitation on its will and freedom of action: at most they import a voluntary self-limitation enduring only as long as its own interests permit. The rights of weaker States, when clashing with its own interests, must be disregarded. There is no room for Christian pity in this conception of State absolutism. "The State," says Treitschke, "is the highest thing in the external society of man; above it there is nothing at all in the history of

<sup>1</sup> Jähns, *Krieg und Frieden*, p. 8. (The present writer is indebted for the last three references to an article on Carl von Clausewitz by Sir John Macdonell, in *Contemporary Review*, November, 1914.)

the world." Accordingly, the family of nations, international comity, and international law are mere chimeras. The highest duty of the State is the acquisition of power, the extension of its dominion, the spreading of its "culture." Of all political sins, this writer declares, the sin of feebleness is the most contemptible.<sup>1</sup>

In this point of view we see something of Machiavellism. Machiavellism was certainly not in itself systematic perversity; though in ordinary language it implies cunning and perfidy. It eliminates moral considerations from politics and international relationships, as it would eliminate them, say, from the science of mechanics. It has, no doubt, inspired the perpetrators of some of the most diabolical outrages that have been committed in the world. We may be sure that those responsible, for example, for the Massacre of St. Bartholomew, for the assassination of prisoners in September 1792, for the murder of Armenians in Constantinople, 1896, for the terrible excesses of the German armies towards unarmed civilians—all these deeds were due to the application of some Machiavellian principle or other. We may well believe that Catholics, revolutionaries, Mohammedans, Germans were contemplating the advantage of their respective countries, and were ruthlessly carrying out the behests of this "reason of State," this State necessity. Machiavelli says in *The Prince* that a good sovereign cannot always be a good man; he ought not to adhere to his promise if its observance might be to his detriment, and if the reasons which induced him to make it have disappeared.

To conclude our survey of these doctrines of Machiavellism and State absolutism, and to show not only how they are fundamentally incompatible with the existence of a society of States and international law, but also how their application would render impossible the continuance of international life altogether, let us examine more fully the views of General F. von Bernhardi. We select him as

<sup>1</sup> *Politik*, I. § 8.

a notable representative of his school, not by any means because of his pre-eminence—indeed, we shall see presently that his arguments, even in the small part of his writings relevant to our present subject, lack logical cogency and betray extraordinary confusion of thought; we select him because he has recently exercised such great influence on his country, because his ideas are typical of those held by the supporters of the doctrine of State necessity, and because his books have been in everybody's hands. In his preface to *Germany and the Next War* (published 1912) he observes: "Our science, our literature, and the warlike achievements of our past have made me proudly conscious of belonging to a great civilized nation which, in spite of all the weakness and mistakes of bygone days, must, and assuredly will, win a glorious future; and it is out of the fulness of my German heart that I have recorded my convictions. I believe that thus I shall most effectually rouse the national feeling in my readers' hearts, and strengthen the national purpose." Let us look into some of these convictions, and see their purport and significance; for they were intended to arouse his countrymen to the end that they might achieve a "glorious future."

Like Clausewitz, he believes that war means the use of force for attaining a political object, unrestrained by any sanction, and subject only to the demands of expediency. Only the "fittest" must survive—the "fittest" meaning simply those who can wage war most mercilessly and drastically and subjugate their opponents. Peace is maintainable only by securing an equilibrium of forces; but an application of his principles, if carried out logically and thoroughly, would never lead to an *equilibrium* of forces, but rather to a predominance of the greatest Force, as represented by the mightiest State, over the smaller forces, as represented by the weaker States; and such predominance would mean eventually the entire displacement of the latter by the former. Thus would international life become a non-entity. He asserts that weak States are contemptible and have no right to exist at all; but, again,

the implication here is, not that the small countries have no right to exist, but that all countries are to be condemned which are unequal in material might to the most powerful. Thus a family or society of nations would become impossible. Might is the supreme right, he says, and the dispute as to what is right is decided by the arbitrament of war; "war gives a biologically just decision."<sup>1</sup> That is, in his view the keynote is absorption; but biologists and sociologists tell us that the natural process is the antithesis of this, namely a passing from the homogeneous to the heterogeneous. In his deification of war, he confuses heroism with the unrestrained exercise of brute force. In his desire to attain to the super-State, he confuses selfish cunning with political wisdom. "Germany's output in brain-work," he says in another publication, "is greater than that of any other people. We must assert our mental and moral influence as much as possible, and pave the way everywhere in the world for German labour and German idealism. . . . If we wish to gain the position in the world that is due to us, we must rely on our sword, renounce all weakly visions of peace, and eye the dangers surrounding us with resolute and unflinching courage. . . . We seem to have forgotten that a policy to be successful must be backed by force, and that on the other hand the physical and moral health of a nation depends on its martial spirit."<sup>2</sup> And he concludes this book by expressing a hope that "the German people will assert and maintain itself as the dominating race of Europe."

Bernhardi, misconceiving the maxim of Heraclitus that "war is the father of all things," holds that there is a natural hostility between States. He assumes that the interests of every State are necessarily antagonistic to those of every other State. The Christian morality, founded on the law of love, can claim no significance for the relations of one country to another.<sup>3</sup> Afterwards he says that

<sup>1</sup> *Germany and the Next War*, chap. i.

<sup>2</sup> *War of To-day* (published 1911), Introduction.

<sup>3</sup> *Germany and the Next War*, chap. i.

Christianity is the most combative of all religions; and further on he observes that Christianity "leads man beyond the limits of a State to a world citizenship of the noblest kind, and lays the foundation of all international law. . . ."<sup>1</sup> But soon he recollects his main theme, and quotes: "Law is the weakling's game." Speaking of different conceptions of law and right obtaining in different places and at different times, he points out that in Christian countries murder is a grave crime, but amongst a people where blood-vengeance is deemed to be a personal duty it may be regarded as a moral act. Here he would infer the greater from the lesser; he fails to see that the very practice of blood-vengeance in a given locality is not based on "right," but exists through the inefficiency of the law in that locality; and that should the practice be universally admitted, there could be scarcely any limit to assassination and butchery, and the continuance of even the most rudimentary society would become impossible. Arguing thus from what is conceived to be a "moral" act in this or that barbarous or semi-barbarous community, he concludes that now and here the right to make war for the purpose of conquest is supreme; but he forgets that this very act, in the present society of States, aimed at one of its members, is considered illegal, unless it proceeds from just causes universally recognized as such. In other words, it may be said, the right to make unprovoked war might or might not exist—for aught we know—in some other planet, but certainly not in this world as at present constituted.

Another cause of uncertainty, Bernhardi says, is due to the fact that the moral consciousness of the same people alters with the changing ideas of different epochs and schools of philosophy; the established law can seldom keep pace with this inner development, this growth of moral consciousness, so that legal forms become superannuated. Then "laws turn reason into nonsense." He concludes, therefore, that no absolute rights can be laid down even for men who share the same ideas in their private relation-

<sup>1</sup> *Germany and the Next War*, chap. v.

ships; and that a universal international law is impossible, in view of the far-reaching and complicated relations between nations and States. Here he is confounding the position of some particular State with that of the entire society of States. It is true that no *absolute* laws for all details of life can be established; indeed, there can be no absolute laws at all save for an entity that is absolute. He does not see that the existing laws relative to a community of individuals or to a community of nations, when they are found wanting in any respect, can be adjusted to the new requirements by the community concerned, either by way of general express consent, or by practice that becomes universal or general and is acquiesced in and recognized as legitimate and valid. He does not see that to destroy the "superannuated" laws and substitute others by means of the sword will set a disastrous example to succeeding powerful States and to succeeding ages when those very substituted laws become themselves superannuated. Who is to decide when the laws become superannuated? What if one State thinks so and the rest of the world holds otherwise? He does not see that no one expects to establish a universal international law to provide for all the affairs of complicated relationships; and he fails to realize that provisions for regulating essential matters concerning the entire society of civilized States are not only possible but actually inevitable—unless, of course, there is to be no society of States any longer. But even if this should be abolished, there would presumably be some kind of society of human beings, and some kind of law would be necessary. "Ubi societas ibi ius"—had Bernhardt and his fellows but recognized the significance of this simple, incontrovertible, elemental, nay axiomatic maxim, from how many blunders and misconceptions and arrogant presumptions would they not have been delivered!

Next, we come suddenly on the statement that no nation has a better right than any other—which is in direct contradiction to other parts of his argument. Even here the pronouncement is ambiguous, because much depends on the meaning of "right," and on the particular circum-

stances in which the right is to be exercised. In his view the bulk of international life is outside codification ; and if a comprehensive international code were drawn up, no self-respecting nation would sacrifice its own conception of right to it ; for by so doing it would renounce its highest ideals, allow its own sense of justice to be violated by an injustice, and so dishonour itself. Bernhardi is here assuming, strangely enough, that such international law would be drawn up by some external agency, and imposed by it on "self-respecting" nations without their consent ; he is also assuming that a nation cherishing "high ideals" would necessarily have a different conception of right from that involved in the established international law, and that the recalcitrant nation's conception would be just whilst the view of the rest of the world would be unjust. He does not see that this particular nation would voluntarily take part, like any other, in the construction of the public common law, that it would have an opportunity of showing that its own view is the best for all, and that its acceptance of the result of the deliberations would imply satisfaction with it and willingness to be bound by it. He does not see the necessary corollary that it could not afterwards, in order to suit its own purposes, repudiate its previous consent, and that it would not have the right to chop and change conformably to its changing convenience. For if, according to his own pronouncement, no nation has a better right than another, it certainly cannot have a better right than many others put together. Membership of the international society, like citizenship in any given State, confers privileges and imposes burdens ; human law and order imply the existence of rights and obligations ; it may, no doubt, be pleasant to enjoy the rights conferred and unpleasant to fulfil the obligations imposed ; but the two are necessarily correlative, their separation is inconceivable, and attempts to sunder them would be productive of anarchy and chaos.

Bernhardi attacks arbitration treaties as being particularly detrimental to an aspiring State, bent on self-

aggrandizement—because, forsooth, a court of arbitration would be compelled to condemn departures from agreements, and so would arrest every progressive change. What it would arrest, rather, is the arbitrary will of the unscrupulous and ambitious State. He holds, then, that a warlike decision is of higher worth than an arbitral decision. Obviously he means of higher worth for the more powerful unscrupulous State; the weaker State when conscious that it has a good cause and is duly observant of its obligations would think otherwise, and would refuse to consider might as a measure of right. He emphasizes, indeed, that all efforts directed towards the abolition of war are foolish as well as absolutely immoral, and are unworthy of the human race : perhaps he would hold that such efforts are worthy only of the brute creation. However, forgetting his admission that no State has greater rights than any other, he concludes that powerful States are entitled to war down weaker nations and swallow them up. In his eyes the entire notion of arbitral courts, international law, equal treatment of all nations, is a presumptuous encroachment on and interference with the natural laws of development. He seems to imagine that natural development is some mysterious process taking place irrespectively of human desires and ideals, and is antagonistic to the voluntary establishment of institutions. Perhaps he really thinks that natural development is brought about when the world is made to adapt itself to the demands of a self-seeking military country. International arrangements, international law, and international institutions are, to be sure, part and parcel of the natural development of mankind ; for in the progress of civilization there can be no “ natural ” law pure and simple—that is, natural in the sense of impersonal, detached from human beings, divorced from their efforts ; rather, individuals and States actuated by their noblest aspirations and following the highest leading help to bring about this natural development. Bernhardt contends that if the military efficiency of a State diminishes, whilst civilization grows and material



prosperity increases, the capacity to maintain its independence will then lessen, and the State will approach its downfall. No doubt that might well come about, if such a State were surrounded by unprincipled avaricious States, and there were no international law in force with the necessary sanctions for restraining temptations. Moreover, the very military efficiency demanded by Bernhardi is the great danger—the present European upheaval is ample proof; without it there would be less temptation to attack a weak neighbour. And even if we admit the virtues claimed for military efficiency, it would come to pass that the deciding factor would be military superiority, since States could not all reach the same degree of military efficiency. Thus, as he says, the maintenance of peace never can or may be the goal of policy.<sup>1</sup> But this is contrary to the view of the world at large, which believes that peace is the normal condition of men and States.

In the second chapter of his book Bernhardi goes on to observe that if a State neglects its interests, it injures the private interests of its subjects, and injures itself as a legal personality. The connection here is difficult to apprehend. According to the doctrines of the preceding chapter, an ambitious State ought not to be a "legal personality"; for a legal personality implies the recognition of and subjection to law, and an ambitious State repudiates inconvenient law, and relies on the sword. Again, the gulf (he says) between political and individual morality is not so wide as is generally assumed; for the power of the State does not rest exclusively on the factors constituting material power, but also to a large extent on moral elements. This observation is in conflict with the whole purport of what precedes. He has repeated again and again that might is right. But in the intrinsic exercise of might there is no question of morality; for purpose and intention are all-important. Morality implies at least fulfilment of one's duty and one's plighted word, even though it be found unexpectedly uncongenial; and such morality for

<sup>1</sup> *Germany and the Next War*, chap. i.

States Bernhardi looks upon with contempt. In truth, according to his previously expressed views the gulf between political and individual morality must inevitably be wide. He is no doubt thinking of super-morality; but whatever it be, the world does not appear to desire this egregious consummation. The quoted observation of Frederick the Great, "Negotiations without arms are like music-books without instruments," will not hold as a valid simile. Negotiations conducted for the attainment of a certain purpose are not necessarily inseparable from arms; the moment arms are introduced, the negotiations at once cease to be negotiations and become hostilities. On the contrary, music-books are necessarily inseparable from instruments; the first must imply the second, and are produced solely for their sake. Further, he declares that the great statesman, having the interests of his country at heart, and seeking an expedient occasion for making war, must think of Kant's categorical imperative: "Act so that the maxim of thy will can at the same time hold good as a principle of universal legislation." <sup>1</sup> If this were so, we should have a world in which you must rule others by your might, or be slaves yourselves; no other condition, such as independence of States and enjoyment of equal rights, would be tolerated. As the present world is constituted, however, the adoption of the bellicose, swallowing-up policy as an essential criterion would mean nothing less than universal conflict, desolation, annihilation—that is, the very negation of States and international life; so that this or any other criterion would itself eventually become inapplicable.

In chapter v. our author assails the principle of European balance of power, which (he remarks) has enjoyed, since the Congress of Vienna, an almost sacrosanct but altogether unjustifiable existence. "It is not now a question of a European State system but of one embracing all the States of the world, in which the equilibrium is established on real factors of Power." But equilibrium cannot be established

<sup>1</sup> *Germany and the Next War*, chap. ii.

on mere power as such, in the way that equilibrium can be established between mechanical forces. For it is impossible to produce among States an exact, a mathematically perfect, equality of forces. Therefore, to secure stable equilibrium other factors must be brought into play, namely the mutual understandings and common engagements established by international law. He asks "whether all the political treaties which were concluded at the beginning of last century under quite different conditions—in fact under a different conception of what constitutes a State—can or ought to be permanently observed." We answer that the fundamental conditions are not different at all. The growth in a country's population and wealth and covetousness cannot alter the fundamental conditions necessary to inter-state relationships. As well may a man want to repudiate a contract because he has acquired a larger house, or because his family has increased. Bernhardt really means a conception different from his own or from that of his countrymen. In his view the conception of permanent neutrality is wholly antagonistic to the essential nature of the State. It is not clear whether the permanent neutrality is contrary to the nature of the neutral State itself, or is contrary to the nature of a more powerful neighbouring State that casts wistful eyes on it. Can he mean that the violation of the neutrality, say, of Belgium, and the devastation of the country and the massacre of its people are essential to the *raison d'être* of Belgium as a State, or are indispensable to the self-realization of Germany as a State? Some explanation, however, is given in the exposition that follows: "The principle that no State can ever interfere in the internal affairs of another State is repugnant to the highest rights of the State"—that is, of the interfering State. Then he goes on to say that the relation of States to each other is that of individuals. But just as an individual may legitimately decline the interference of others in his own affairs, so, naturally, is the State entitled to exercise the same right. An important difference, however, is to be noted. Above the individual stands the

authority of the State, which regulates the relationships of individuals to each other; whilst above the State stands no one. Here, then, Bernhardi says at one moment that interference by one State in the internal affairs of another is legitimate; at another moment, that a State is entitled to decline such interference. He compares here States to individuals; elsewhere he holds that they cannot be compared at all. What he wishes to prove is that the principle of non-intervention is based, not on conceptions of international right, but simply on power and expediency. In other words, a State A, being more powerful than another state B, is justified, by reason of its greater might, in intervening in the affairs of B when it is found expedient to do so. But cases of expediency will not be far to seek; so that it would surely come to pass that B would be crushed and swallowed up by A. To confirm his position he quotes Treitschke, his adored master, whom he has not always understood: "Every extension of the activities of the State is beneficial and wise, if it arouses, promotes, and purifies the independence of free and reasoning men; it is evil when it kills and stunts the independence of free men."<sup>1</sup> But how does this square with his doctrine that small States have no right to exist and may be crushed by the more powerful? We are to suppose, perhaps, that free and reasoning men are to be found only in the powerful, ambitious State. The citizens of the smaller States might not regard it as the independence of free men to be stamped with "the impress of the German spirit."<sup>2</sup> Had our author but the faintest knowledge of history, he would have recognized how the smaller States of the world have fully justified their existence, and what glorious contributions to civilization some of them have furnished.

In chapter xiv.—the last we shall refer to—Bernhardi, conformably to the doctrines of his teachers, pronounces against the binding character of international agreements. He says they are always concluded with a tacit reservation—

<sup>1</sup> *Politik*, I. § 2.

<sup>2</sup> *Germany and the Next War*, chap. v. *in fin.*

"*rebus sic stantibus*"; that they are valid only as long as they are advantageous to the contracting parties (he really means to the more mighty contracting parties); and that nothing can compel a State to act contrary to its own interests. And yet he has all along argued that a strong State may justifiably intervene in the affairs of a weaker, and compel it to be subjected to the more powerful sovereign's will.

From the above brief examination of only a small portion of his work, namely that portion dealing with the question of international law and inter-state relationships, we see what an extraordinary medley it is of confusions, self-contradictions, inconsequences, presumptions, and groundless assertions. Certain elements of truth are here and there seized upon; then they are unduly magnified or dwarfed—to say nothing of those that are distorted beyond recognition—so that the conclusions arrived at appear in all their monstrous disproportion. His apotheosis of Machiavellism and of brute force is an outrage on the modern world. Absolutism is now impossible. To allow strength and cunning to triumph means anarchy. The very essence of civilization is order and harmony and rule and discipline. Nations are entitled to live according to their own ideals and their own particular genius; they are entitled to develop and grow, but not at the expense of other nations. Such peaceful and orderly life presupposes the existence of a society of States, whose main relationships are regulated and controlled by international law. And no member of this society may without the consent of the other members set aside any obligation imposed by this law.

The arguments of neither Bernhardi nor any one else can ever convince men who possess reason and self-respect that the rights and obligations established by solemn treaties can be destroyed at the pleasure of one contracting party without the consent of all the other parties. Of course, if such circumstances have supervened as to make a treaty absolutely incapable of performance, that is an entirely

different matter. If signatories are to be allowed to repudiate on any other grounds their deliberately executed engagements at their arbitrary will, then negotiation will become a hypocritical farce, relationships between States will rest on a precarious basis, and the community of nations will be hardly more than a name. Some refer the binding force of treaties to natural or moral law, to the moral consciousness of mankind or to the innate sense of right in man. Some derive it from the self-limitation voluntarily imposed by the respective contracting parties. Others, again, attribute it to long-established custom. All these considerations are worthy of being taken into account; but for our present purpose we may say simply that if the binding force of treaties and international law is universally denied, treaties and international law cannot have any real existence, international transactions become impossible, and the society of States becomes a non-entity. But in the present condition of the world the existence of a society of States is inevitable; and therefore the non-existence of a system of international law is inconceivable. No doubt a State may at a certain moment think it advantageous or expedient to renounce an undertaking; but the dictates of honour and justice demand its observance. And honour and justice are eternal attributes of human worth and dignity, they are indispensable essentials of public life; without them international relationships, frank, harmonious, based on mutual understanding, are impossible. Indeed, in the long run it will even prove an advantage to a State to abide by its covenant; for in breaking its agreement when it happens to suit its purpose it is really sowing the wind to reap the whirlwind. The public welfare of a State, too, depends to a large extent on the common welfare of the society of nations; to the underlying principle of "sociality," reciprocal goodwill and mutual reliability are indispensable.

When in November 1792 the French annexed Belgium (then known as the Austrian Netherlands), and contrary to the stipulation of the Treaty of Münster, 1648, opened

to all nations the navigation of the Scheldt,<sup>1</sup> Pitt made a strong remonstrance. "With regard to the Scheldt," he declared, "France can have no right to annul existing stipulations, unless she also have the right to set aside equally the other treaties between all Powers of Europe, and all the other rights of England and her allies. . . . England will never consent that France shall arrogate the power of annulling at her pleasure and under the pretence of a pretended natural right, of which she makes herself the only judge, the political system of Europe, established by solemn treaties and guaranteed by the consent of all the Powers."<sup>2</sup>

Again, in 1870, during the Franco-Prussian War, Russia took the opportunity of arbitrarily setting aside the restrictions laid down in Article 2 of the Treaty of Paris, 1856, concerning the neutralization of the Black Sea. The other Great Powers, who were, together with Russia, parties to the treaty, strongly protested against this conduct, and Russia therefore abandoned the attitude she had at first assumed. Subsequently, a Conference was held in London, 1871, when the concession Russia had sought to extort was granted voluntarily by the other contracting parties; thus the binding force of the treaty was vindicated. It was also specially declared at this Conference "that it was an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."

Further—to mention an important recent example—in 1908 the Austrian Emperor and the Prince of Bulgaria announced that they intended to repudiate certain provisions of the Treaty of Berlin. The action of Austria at once called forth the protests of European Powers, and was condemned by universal public opinion. Accordingly amends were made for the affront to Turkey, and pecuniary compensation was paid.

<sup>1</sup> See *infra*, Chap. XVI. *in fin.*

<sup>2</sup> Cf. *Cambridge Modern History*, vol. viii. p. 304.

Similarly, international law in general—of which treaties form but a part—possesses binding force, both in time of war and in time of peace. Clausewitz, in his usual manner, speaks contemptuously of those “self-imposed restrictions, almost imperceptible and hardly worth mentioning, which are termed the usages of international law.” Even in his day the restrictions on international licence, whether in peace or in war, were by no means imperceptible. The fact that they grew up gradually or were imposed voluntarily by the leading civilized States of the world does not deprive them of their obligatory character; indeed, it imparts to them their very compulsive force. The long-established usages and customs of international law possess the force of law in the true significance of the term; the regulations and provisions laid down specifically by States in conference have juridical potency, certainly as between the parties thereto, and probably also between others if such rules conform to the spirit of the previously existing international law and reasonably meet the exigencies of international relationships in general. Not all law is bound to satisfy the hard-and-fast requirements of the Austinian analysis. These clearly and sharply defined requirements are not even applicable to all branches of municipal and constitutional law; they are certainly much too narrow to cover the different circumstances incidental to international relationships. The mere form of the sanction is immaterial. The criterion of immediate enforceability by a determinate sovereign is not absolutely essential to all binding rules. The distinction is well put by Richard Hooker: “They who are thus accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon, whereby actions are framed, a law.”<sup>1</sup> In the latter sense we may properly apply the term “law” to those international regulations that are generally accepted by civilized communities. Besides, it is by no means unreasonable to urge that

<sup>1</sup> *Ecclesiastical Polity*, Book I. chap. iii. 1.



the European and the World Congresses constitute a determinate legislator and sovereign authority—though no machinery has yet been established to compel obedience to the laws promulgated. It is true that so far no sanction has been devised in the form of a world tribunal, capable of applying, if need be, physical force to vindicate inter-state law. But whether such a sanction will or will not be devised in the future, we may say emphatically that hitherto the sanction which has been referable to public opinion, to the absolute necessity of conducting international relationships in an entirely orderly manner, to the voluntary determination of the constituent members of the community of States, has possessed adequate potentiality in the eyes of nations valuing honour, fidelity, and good report. Again and again have the plenipotentiaries of States, assembled in the name of international law and for the purpose of effecting thereby harmonious adjustments, openly and expressly recognized the binding character of that international law and declared their resolution to observe it. Thus, a century ago, at Aix-la-Chapelle (1818), the Great Powers, of which Prussia was one, declared that it was their “unalterable determination never to swerve from the strictest observance of the principles of the Law of Nations, either in their relationships with one another or with other States.”

In some quarters international law is identified with international morality. But this cannot properly be done. Those favouring such assimilation are too subservient to their own abstractions, and fail to take into account differences in practice, and differences recognized, tacitly or openly, by the family of nations. To speak accurately we should say that by international law is meant the body of rules which States *must* observe, because they have agreed to accept them, and because if they repudiate them at their discretion, international relationships, which are unavoidable in the present state of the world, will degenerate into chaos and confusion. On the other hand, international morality implies those rules which States *ought* to observe in addition, conformably to the best and most enlightened

opinions of mankind, in order that those relationships, governed by obligatory prescriptions, may in actual practice proceed not only smoothly but amicably, and may engender mutual esteem. Briefly, then, we may say that for practical purposes the rules of international law are compulsive, those of international morality optional.

Where there is life there must be adaptation to circumstances, there must be self-discipline, self-restraint. Where there is society, even the most rudimentary, there must be common restraints and adjustments—some proceeding from the nature of things, and others established by the general will—even though this or that individual finds them irksome at times. Where there are civilized communities there must likewise be common adjustments and understandings, implying reciprocal rights and obligations which are binding even though this or that community finds them inconvenient at one time or another. The interests of all, universal harmony and tranquillity, public right and justice, have greater importance than the suddenly conceived pretensions of some particular recalcitrant community.

Moreover, when such inveterate regulations have been deliberately confirmed by international conferences, when additional rules have there been introduced to enlarge the existing system and have been sanctified by solemn treaties and conventions, we get a body of jurisprudence which is supported not by the sanction of the policeman, but by the greater sanction of universal opinion, universal consent, universal conviction, universal will, added to the universal recognition that violation of the rules thus laid down will in the long run bring evil on the violator himself. This is the kind of sanction that makes the observance of a canon of conduct stricter indeed than that of a positive law supported by the physical force of a determinate superior; for this is the kind of sanction that is imprinted indelibly on the consciousness of humanity, that impels men and States to submit to it, because they are men and organized communities of men, and because they desire to stand well with their fellows. The appeal to force alone

is a manifestation of barbarism; it implies indeed a return to the worst instincts of the brute creation. It is not—as the blind advocates of grossly perverted doctrines would have—a characteristic of super-humanity. The only being that may properly and intelligibly be called a super-man is the perfect man living in a perfect society—and this involves the existence of perfect wisdom, perfect justice, perfect law.

## CHAPTER III

### DECLARATION OF WAR—EARLIER PRACTICE—THE HAGUE RULES—CHARACTER OF THE ULTIMATUM—POSITION OF ALLIES

THE question as to the necessity of a declaration of war before the actual commencement of hostilities has long been a subject of much controversy. In ancient times and in the Middle Ages such declarations were the rule rather than the exception. According to the practice of the seventeenth century, they were not considered indispensable. Grotius declares that a formal proclamation must be made. But the rule was disregarded by belligerent States in his own time, and also right down to modern times. Circumstances determined what particular policy was to be adopted; sometimes war was publicly declared, at other times hostilities were begun secretly or suddenly without any prior notification. From the eighteenth century diplomatic proclamations became the exception. In 1754 hostilities both on land and on sea were begun between England and France, but the formal declaration of war was only made two years later. Towards the close of the year 1787 Austria attacked and took possession of several Turkish fortresses, and did not issue a notification of war until some months had elapsed. It has been calculated that out of 118 wars that occurred between 1700 and 1872, there were hardly ten cases in which hostilities were preceded by a declaration.<sup>1</sup> However, in the latter part of the nineteenth century, there seemed to be a tendency to recur to the ancient practice of prior notification. Thus, in

<sup>1</sup> Cf. Major-General J. F. Maurice, *Hostilities without Declaration of War* (London, 1883).

the war between France and Prussia, 1870, a specific notice was previously given, as was also the case in the war between Russia and Turkey, 1877. But in the Chino-Japanese war, 1894-5, hostilities were not preceded by any declaration, the war having begun simply with the capture of a Chinese transport vessel by a Japanese cruiser. Also in the Spanish-American war, 1898, the United States captured several Spanish vessels, and commenced blockading Cuban ports on April 22, and on April 25 made a formal declaration, which dated back the existence of hostilities to April 21. But it is to be observed here that there had been a previous ultimatum, implying a conditional declaration. In the South African war, too, an ultimatum was delivered to the British agent at Pretoria, October 9, 1899, demanding a satisfactory reply by 5 p.m. on October 11. Again, in the Russo-Japanese war, 1904, Japan attacked the Russian fleets at Chemulpo and at Port Arthur on February 8, two days before her notification of war; whereupon Russia charged Japan with treacherous conduct. The charge was scarcely maintainable, as there had been no surprise attack. The surprise of a Government or nation is not to be confused with the permissible surprise of the military or naval forces. Diplomatic relations, which had been going on without avail since the preceding July, had been severed on February 6 by the Note that "the Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests." This was, of course, a warning that hostilities might be commenced at any moment. Some few hours before the delivery of the Note in St. Petersburg the Japanese had, in fact, captured a Russian cruiser, owing to the appearance of the Russian fleet between Port Arthur and the Japanese coast on February 4.<sup>1</sup> These proceedings were not contrary to approved precedents.

<sup>1</sup> S. Takahashi, *International Law applied to the Russo-Japanese War* (London, 1908), pp. 8, 14, 15, 761.

Apart from any conclusions to be derived from actual practice, there has been a difference of opinion on the question among jurists and publicists. The English view has been in general that a declaration is not necessary. In a well-known case<sup>1</sup> Lord Stowell laid down that a war might properly exist without a declaration, which was simply the formal evidence of a fact. "A declaration of war by one country was not a mere challenge to be accepted or refused at pleasure by the other. On the contrary, it served to show the existence of actual hostilities on one side at least; and hence put the other party also into a state of war, even though he might think proper to act on the defensive only." The Continental current of opinion has on the whole been strongly in favour of a prior notification; and sometimes the doctrine of Great Britain has been attributed to unworthy motives. England, says a French writer, finds it to her advantage to dispense with declaration, because, possessing a monopoly of the telegraphic cables of the world and having warships in every sea, "she can strike damaging blows at her enemy's commerce the moment hostilities open." Accordingly, the Continental view was that acts committed before notification of war have a doubtful character, as the State assailed is uncertain whether they are open hostilities or merely unauthorized attacks.

Because of the immediate result of hostilities affecting neutrals as well as belligerents, it was customary to issue a general manifesto either on the outbreak of war or immediately afterwards, so as to fix the date from which the liabilities of neutrals would commence. This practice was, however, rather a matter of courtesy than legal obligation; for in case such manifesto were omitted a neutral State and its subjects were not entitled to exemptions if they had had in fact notice of the war, or if the war was a matter of common knowledge.

The Hague Conference of 1907 dealt with the subject, and arrived at definite rules in its third Convention, which

<sup>1</sup> *The Elisa Ann* (1818), 1 Dods. 244. Cf. Pitt Cobbett, *Leading Cases on International Law*, vol. ii. (1913), p. 8.

now therefore imposes specific obligations. Article 1: The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war giving reasons, or an ultimatum with a conditional declaration of war. Article 2: The existence of a state of war must be notified to the neutral Powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph. Nevertheless, neutral Powers may not rely on the absence of notification, if it be established beyond doubt that they were in fact aware of the existence of a state of war. Article 3: Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article 2 applies as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

It will be noticed that, according to Article 1, it is not compulsory to issue a formal declaration of war; it will suffice to send an ultimatum. When one State makes certain demands on another, and adds that if a satisfactory reply is not received by a certain time it will take steps to protect its interests, this is an ultimatum involving a conditional declaration of war; so that in case the answer is unfavourable or no answer is returned at all, no further notification is required, as war will be considered to have begun at the time fixed. From the wording of the same article it appears that no definite interval is required to elapse between the declaration and the actual commencement of hostilities. A delay of twenty-four hours was proposed at the Conference, but it was not accepted. Accordingly warlike acts may be committed at the very moment the declaration reaches the adversary; though, no doubt, it was intended that the rule should be construed so as to avoid surprise and treachery. Article 2 recognizes that the interests of neutrals are involved and, conformably to the existing customary rule, requires that they must be informed of the existence of the war or that they must have otherwise learnt of it, before

their various liabilities accrue in regard to contraband trading, unneutral service, blockade, etc. Such specific notification usually takes the form of a manifesto.

These provisions undoubtedly lay down certain definite limitations on the arbitrary conduct of would-be aggressors; but it is obvious that they furnish no safeguard against precipitancy in beginning war, when a Power is bent on it. In the Turco-Italian war, 1911, Italy, after alleging certain grievances, despatched a telegraphic ultimatum to Constantinople, demanding a reply within twenty-four hours from the date of its receipt. An answer was immediately returned, but it was considered unsatisfactory. Accordingly a declaration of war was at once despatched to Turkey, a notification was sent to neutrals, and hostilities were begun simultaneously.

Let us now see how these rules were applied in the present war.

We have already considered in Chapter I the negotiations leading to the state of war between this country and Germany, and the ultimatum to the latter demanding a satisfactory reply the same day with respect to Belgian neutrality. The failure to return such reply by the hour fixed brought into existence a state of war between the two Powers.

The demands made in this case were simple, and referred to one clearly defined issue. On the contrary, the Austrian ultimatum to Serbia involved a complicated and extraordinary issue; indeed, it amounted substantially to a violent indictment of the Serbian Government. On the evening of July 23 the Austro-Hungarian Minister presented at Belgrade a Note with regard to the Serajevo affair, and demanded a reply before six o'clock on the 25th, that is in forty-eight hours. The time allowed was much too short, considering the comprehensive nature of the Note, which is as follows:—

“On March 31, 1909, the Royal Serbian Minister in Vienna, on the instructions of the Serbian Government, made the following statements to the Imperial and Royal Government:



“Serbia recognizes that the *fait accompli* regarding Bosnia has not affected her rights, and consequently she will conform to the decisions that the Powers will take in conformity with Article 25 of the Treaty of Berlin. At the same time that Serbia submits to the advice of the Powers, she undertakes to renounce the attitude of protest and opposition which she has adopted since October last. She undertakes, on the other hand, to modify the direction of her policy with regard to Austria-Hungary, and live in future on good neighbourly terms with the latter.’

“The history of recent years, and in particular the painful events of June 28 last, have shown the existence in Serbia of a subversive movement with the object of detaching a part of Austria-Hungary from the Monarchy. The movement, which had its birth under the eyes of the Serbian Government, has had consequences on both sides of the Serbian frontier in the shape of acts of terrorism and a series of outrages and murders.

“Far from carrying out the formal undertaking contained in the Declaration of March 31, 1909, the Royal Serbian Government has done nothing to repress these movements. It has permitted the criminal machinations of various societies and associations, and has tolerated unrestrained language on the part of the Press, apologies for the perpetrators of outrages and the participation of officers and functionaries in subversive agitation. It has permitted an unwholesome propaganda in public instruction. In short, it has permitted all the manifestations which have incited the Serbian population to hatred of the Monarchy and contempt of its institutions.

“This culpable tolerance of the Royal Serbian Government had not ceased at the moment when the event of June 28 last proved its fatal consequences to the whole world.

“It results from the depositions and confessions of the criminal perpetrators of the outrage of June 28 that the Serajevo assassinations were hatched in Belgrade, that the arms and explosives with which the murderers were

provided had been given to them by Serbian officers and functionaries belonging to the Narodna Odbrana, and finally that the passage into Bosnia of the criminals and their arms was organized and effected by the chiefs of the Serbian frontier service.

"The above-mentioned results of the magisterial investigation do not permit the Austro-Hungarian Government to pursue any longer the attitude of expected forbearance which it has maintained for years in face of the machinations hatched in Belgrade and thence propagated in the territories of the Monarchy.

"The results, on the contrary, impose on it the duty of putting an end to the intrigues which form a perpetual menace to the tranquillity of the Monarchy.

"To achieve this end the Imperial and Royal Government sees itself compelled to demand from the Royal Serbian Government a formal assurance that it condemns these dangerous propaganda against the Monarchy and territories belonging to it, and that the Royal Serbian Government shall no longer permit these machinations and this criminal and perverse propaganda."<sup>1</sup>

Further, Serbia was called upon to publish on the front page of her *Official Journal* for July 26 a declaration condemning the propaganda, deploring its consequences, regretting that Serbian officers and functionaries participated in it, and undertaking to proceed with the utmost rigour against the machinations complained of. Also, this declaration was required to be simultaneously communicated as an Order of the Day by the Serbian King to his army and to be published in the *Official Bulletin* of the army. Finally, the Serbian Government was called upon to do a dozen other things by way of redress.

To say nothing of the lesser requirements, the Note contained three very serious demands, namely: that King Peter should issue an Army Order the words of which were actually dictated by the Austro-Hungarian Government; that certain officers and officials, who were to be

<sup>1</sup> *The Times*, July 24, p. 8.

pointed out by the Austro-Hungarian Government, should be removed from the Serbian service; and that Austro-Hungarian officials should be allowed to co-operate in the suppression of anti-Austrian propaganda in Serbia.

In their reply the Serbian Government claimed that they had given ample proofs of their pacific and moderate policy during the Balkan crisis, and pointed out that they could not reasonably be held responsible for manifestations of a private character, such as newspaper articles, and the peaceful work of various societies. They offered to comply with many of the demands, and suggested that in case their reply, taken as a whole, was not considered satisfactory, they were prepared to submit the question to the decision of the International Tribunal at The Hague, or to the Great Powers that took part in the drawing up of the Declaration made by the Serbian Government in March 1909.

The Austro-Hungarian Minister rejected the reply as being "inadequate," and left Belgrade immediately for Hungarian territory.

Shortly afterwards a formal declaration of war was announced from Vienna: "The Royal Government of Serbia not having given a satisfactory reply to the Note presented to it by the Austro-Hungarian Minister, in Belgrade on July 23, 1914, the Imperial and Royal Government of Austria-Hungary finds it necessary itself to safeguard its rights and interests, and to have recourse for this purpose to force of arms. Austria-Hungary therefore considers itself from this moment in a state of war with Serbia."

The Austro-Hungarian ultimatum was of a grossly undiplomatic character, and appears to have been drawn up by its authors with the set purpose of precipitating war. Its manner and tone were brutal and outrageous; the language used was unjustifiably stern, curt, and dictatorial; it was more in keeping with a hot-tempered master addressing an offending servant than with a sovereign State addressing an equally sovereign State. According to the long-established customs of diplomacy, due courtesy, respect

and etiquette are essential attributes in inter-state communications, even in such as immediately precede the outbreak of hostilities. But the Austrian ultimatum was unprecedented in its arrogance and presumption. Moreover, it was intolerably exorbitant in its demands, which were undoubtedly calculated to wound deeply the dignity of the Serbian sovereign, and the self-respect of the Serbian army, which had, indeed, proved victorious in two wars.

The declaration of war by Great Britain and by France against Austria was as follows:—

“Diplomatic relations between France and Austria being broken off, the French Government have requested His Majesty’s Government to communicate to the Austro-Hungarian Ambassador in London the following Declaration:—

“‘Après avoir déclaré la guerre à la Serbie et pris ainsi la première initiative des hostilités en Europe, le Gouvernement austro-hongrois s’est mis, sans aucune provocation du Gouvernement de la République Française, en état de guerre avec la France;

“‘1°.—Après que l’Allemagne avait successivement déclaré la guerre à la Russie et à la France, il est intervenu dans ce conflit en déclarant la guerre à la Russie qui combattait déjà aux côtés de la France.

“‘2°.—D’après de nombreuses informations dignes de foi, l’Autriche a envoyé des troupes sur la frontière allemande, dans des conditions qui constituent une menace directe à l’égard de la France.

“‘En présence de cet ensemble de faits, le Gouvernement français se voit obligé de déclarer au Gouvernement austro-hongrois qu’il va prendre toutes les mesures qui lui permettront de répondre à ces actes et à ces menaces.’

“In communicating this Declaration accordingly to the Austro-Hungarian Ambassador, His Majesty’s Government have declared to His Excellency that the rupture with France having been brought about in this way, they feel themselves obliged to announce that a state of war exists

between Great Britain and Austria-Hungary as from midnight.”<sup>1</sup>

The Japanese declaration of war is of considerable interest. In 1902 the Anglo-Japanese treaty of alliance was established. Article 2 says: If either Great Britain or Japan in the defence of their respective interests as above described [that is, in reference to China and Korea] should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally. Article 3: If in the above event any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance, and will conduct the war in common, and make peace in mutual agreement with it. In accordance with the terms of this alliance, Japan delivered an ultimatum, August 15, demanding that Germany should evacuate the port of Kiaochau, which she had leased from China, and that German warships in Japanese and Chinese waters should either depart or be dismantled. (It may be mentioned that the Japanese had given an assurance that Kiaochau would be restored to China.) No reply was received to this ultimatum. Accordingly Japan declared war on Germany, August 23. The following is the text of the Imperial Rescript:—

“We, by the Grace of Heaven, Emperor of Japan, on the throne occupied by the same dynasty from time immemorial, do hereby make the following proclamation to all Our loyal and brave subjects:—

“We, hereby, declare war against Germany, and We command Our Army and Navy to carry on hostilities against that Empire with all their strength, and We also command all Our competent authorities to make every effort in pursuance of their respective duties to attain the national aim within the limit of the law of nations.

“Since the outbreak of the present war in Europe, the calamitous effect of which We view with grave concern,

<sup>1</sup> *London Gazette*, August 12.

We, on Our part, have entertained hopes of preserving the peace of the Far East by the maintenance of strict neutrality, but the action of Germany has at length compelled Great Britain, Our ally, to open hostilities against that country, and Germany is at Kiaochau, its leased territory in China, busy with warlike preparations, while her armed vessels, cruising the seas of Eastern Asia, are threatening Our commerce and that of Our ally. The peace of the Far East is thus in jeopardy.

“Accordingly, Our Government and that of His Britannic Majesty, after a full and frank communication with each other, agreed to take such measures as may be necessary for the protection of the general interests contemplated in the Agreement of Alliance, and We on Our part being desirous to attain that object by peaceful means commanded Our Government to offer with sincerity an advice to the Imperial German Government. By the last day appointed for the purpose, however, Our Government failed to receive an answer accepting their advice.

“It is with profound regret that We, in spite of Our ardent devotion to the cause of peace, are thus compelled to declare war, especially at this early period of Our reign, and while We are still in mourning for Our lamented Mother.

“It is Our earnest wish that, by the loyalty and valour of Our faithful subjects, peace may soon be restored and the glory of the Empire be enhanced.”

In order to supplement the purport of the above Rescript, it is desirable to refer to the speech delivered in the Japanese Diet, September 3, by Baron Kato, the Japanese Foreign Minister, who stated forcibly and concisely the reasons that caused Japan to become a belligerent in the present war. Reviewing the events of the preceding month, and the situation in Europe, he spoke to the following effect: “Early in August the British Government asked the Imperial Government for assistance under the terms of the Anglo-Japanese Alliance. German men-of-war and armed vessels were prowling around the seas of Eastern

Asia, menacing our commerce and that of our Ally, while Kiaochau was carrying out operations apparently for the purpose of constituting a base for warlike operations in Eastern Asia. Grave anxiety was thus felt for the maintenance of peace in the Far East. As all are aware, the agreement and alliance between Japan and Great Britain has for its object the consolidation and maintenance of general peace in Eastern Asia, and the maintenance of the independence and integrity of China, as well as the principle of equal opportunities for commerce and industry for all nations in that country, and the maintenance and defence respectively of territorial rights and special interests of the contracting parties in Eastern Asia. Therefore, inasmuch as we were asked by our Ally for assistance at a time when commerce in Eastern Asia, which Japan and Great Britain regard alike as one of their special interests, is subjected to a constant menace, Japan, who regards that Alliance as a guiding principle of her foreign policy, could not but comply with the request to do her part."<sup>1</sup>

According to the published reports, it appears that Germany committed hostilities against France without previously proclaiming the existence of a state of war between the two countries. Indeed, whilst the German Ambassador was still in Paris, German troops violated the French frontier at four points and committed acts of war (August 2)<sup>2</sup>:—

(1) German troops crossed the frontier in the neighbourhood of the French fort Manonvillers, near Lunéville, and penetrated to Cirey-les-Forges in French territory.

(2) A body of German troops crossed the frontier near Longwy, on the Belgian frontier.

(3) German troops crossed the frontier from the direction of Mulhouse, reached Delle-Petit Croix, and fired on the French Customs guards.

(4) Two German cavalry officers, sent on reconnaissance, were killed 10 kilometres within French territory.

<sup>1</sup> *The Times*, September 6, p. 2.

<sup>2</sup> *Ibid.*, August 8, p. 5.

Again, on the following day raids by German cavalry were reported to have taken place. German troops entered a farm and compelled the peasants there to surrender their cattle.<sup>1</sup> Other aggressive acts were committed by German dragoons and patrol parties.

It is, however, to be noted that the German authorities contradicted these allegations; and they declared, on the contrary, that the French were the first to begin acts of war. They pointed out that on August 2 a French aviator threw bombs on Nuremberg, that during the preceding night French airmen manœuvred over the Rhine provinces, that on the following morning French officers, disguised in German uniforms, crossed the frontier from Belgium into Germany in motor-cars, and that later in the day French troops crossed the frontier near Belfort, and endeavoured to press forward into Upper Alsace. Accordingly it was considered in Berlin that it was France that had attacked Germany without breaking off diplomatic relations. However, the French Embassy denied that there was any truth in these charges.

The position of Austria-Hungary in the first stages of the war of the Allies against Germany deserves some attention. The Austro-Hungarian Empire was united to Germany by means of a special treaty of alliance, stipulating common measures of defence against any Russian attacks on either Power. Thus the first clause of this Austro-German engagement, entered into in 1879 by Bismarck and Andrassy, says: "Should, contrary to the hope and against the sincere wish of the two High Contracting Parties, one of the two Empires be attacked by Russia, the High Contracting Parties are bound to stand by each other with the whole of the armed forces of their Empires, and, in consequence thereof, only to conclude peace jointly or in agreement." Both contracting parties, then, took common action because they held that Russia had been the first to begin active hostilities. Now Italy,

<sup>1</sup> *The Times*, August 4, p. 4.



bound to Germany and Austria by a defensive alliance (1882), evidently thought otherwise, and therefore elected to remain neutral, on the ground that the *casus fœderis* did not in this case apply.

Now a state of war was in existence between this country and Germany since August 4; yet no declaration of war had been made against her ally, Austria, though it was clear that the latter would ultimately take part by the side of Germany in all the necessary offensive and defensive operations. No direct hostilities had been committed by Austrian troops against this country, nor had any hostile manifesto been issued by their Government; and the Austrian Ambassador remained in London for a week after the outbreak of war with Germany. According to the theoretical doctrines of international law, a state of war and a *casus belli* have reference not only to the immediate belligerents, but also to their respective allies, subject, of course, to the character and object of the alliances concerned. In earlier times, a belligerent and his ally were considered, for purposes of war, as practically one State; the former was sometimes also regarded as a principal, and the latter as an accessory. Hence when one of the allied States went to war, no matter where or when or why, the other was expected to go immediately to its assistance. If the latter was already in alliance with the former's adversary, then nice questions of political casuistry, necessity, State interest, etc., arose. But nowadays practice and policy do not necessarily follow such theory. Hence it was possible for Great Britain to continue for a time diplomatic relations with Austria, though Austria took common measures with Germany against Russia, and though Germany was in a state of war with Great Britain. And had Austria undertaken to limit her military operations to Eastern Europe, it might have been possible to postpone still further the declaration of war against her. However, as the war was not merely a land war, and seeing that there were so many States involved in it, that France had declared war against Austria, that Great Britain was to act on

the side of France, and the exigencies of naval movements necessitated a clear distinction between hostile and friendly vessels, all kinds of embarrassments and complications would have arisen if the relation between Great Britain and Austria had remained for any considerable length of time apparently non-hostile. Hence notification of a state of war with Austria-Hungary was rendered inevitable.

The belligerent solidarity of the principal Powers contending against Austria and Germany—to which Turkey afterwards acceded<sup>1</sup>—was testified by their engagement entered into during the war, whereby they agreed not to make peace separately:—

“The undersigned duly authorised thereto by the respective Governments hereby declare as follows:

“The British, French, and Russian Governments mutually engage not to conclude peace separately during the present war. The three Governments agree that when terms of peace come to be discussed no one of the Allies will demand terms of peace without the previous agreement of each of the other Allies. In faith whereof the undersigned have signed this Declaration and have affixed thereto their seals.

“Done at London in triplicate the 5th day of September, 1914.

“E. GREY, *his Britannic Majesty's Secretary of State for Foreign Affairs.*

“PAUL CAMBON, *Ambassador Extraordinary and Plenipotentiary of the French Republic.*

“BENCKENDORFF, *Ambassador Extraordinary and Plenipotentiary of His Majesty the Emperor of Russia.*”<sup>2</sup>

Two or three days later Japan<sup>3</sup> joined in the above agreement, undertaking not to make peace with Germany until the conclusion of the war in Europe, even if Japan succeeded before then in accomplishing her primary object, namely the occupation of Kiaochau.

<sup>1</sup> See *infra*, Chap. XVI. *in init.*      <sup>2</sup> *The Times*, September 6, p. 1.

## CHAPTER IV

### IMMEDIATE EFFECTS OF THE OUTBREAK OF THE WAR — DIPLOMATIC INTERCOURSE — INVIOABILITY OF RETIRING AMBASSADORS — RIGHTS OVER PRIVATE PROPERTY—ENEMY VESSELS IN BELLIGERENT PORTS

(a) As soon as war is declared, diplomatic intercourse, if it has not already come to an end, ceases between the countries concerned; and this happens usually before hostilities begin, by reason of the withdrawal or dismissal of ambassadors or other public ministers representing the belligerent States. Consuls also become incapable of carrying out their functions.

It is customary for each combatant State to request the ambassador or consul of a neutral State to take charge of the archives and other special appurtenances of the belligerent's embassy, and also to protect the interests of its subjects resident in the hostile country. Thus, during the Spanish-American War, the interests of the United States and her subjects were protected at Madrid by the British Legation. In the South African War the interests of Great Britain were placed in the charge of the American Consulate at Pretoria. In the present war, some neutral legations have been called upon to undertake wide responsibility and great labour; in this respect the United States comes first and foremost. America engaged to look after the interests of Germans, Austrians, Hungarians, and Turks in England, of the British and Japanese in Germany and Austria-Hungary, of the Germans, Austrians, and Hungarians in France, of the British and French in Turkey. The American officials were thus required to cope with an

enormous mass of correspondence as to the whereabouts of all these foreign subjects; they have also visited and reported on internment camps in Great Britain and Germany;¹ they have dealt with the letters of prisoners of war—in London the letters of German prisoners numbered some 5,000 in two months; they have organized relief; and over and above all this, the American Embassy has been the channel through which diplomatic communications between the belligerents concerned were conducted.

It is a long-established rule of international law that in the event of their withdrawal or dismissal, ambassadors retain their privileges and immunities until their return to their own country. The most important of these privileges is inviolability, or exemption from injury, restraint, molestation or interference; it extends also to their families and suites, and to their houses and belongings. This rule as to inviolability is one of the most ancient, and has been one of the most scrupulously observed in the whole range of international law. The ambassador is the personal representative of the sovereign who despatches him, of the majesty and independence of the State he represents; he is therefore doubly entitled to all courtesy and respect, and to complete immunity from every kind of personal indignity.

In the present case these fundamental principles—sanctioned by immemorial usage, and venerable in the fullness of their age—do not appear to have been fully observed in every instance. The treatment of the German and Austro-Hungarian Ambassadors in London left nothing to be desired; it was in perfect accordance with the best traditions. The German Ambassador, Prince Lichnowsky, departed from London on August 6, and on his arrival in Holland he telegraphed the following message to Sir Edward Grey: "Please express to His Majesty's Government our sincere thanks for the great courtesy shown to us

¹ As to the position of enemy subjects on belligerent territory, see *infra*, Chap. V.; and as to the position of prisoners of war, see *infra*, Chap. XIV.

during our journey." The Austro-Hungarian Ambassador, together with a suite and staff of over two hundred persons, left London on August 16, and soon afterwards despatched a telegram to the same effect: "Please accept my sincerest thanks for all the arrangements made for my departure. I highly appreciate the courtesy shown to me."

In St. Petersburg nothing seems to have occurred beyond an attack made on the German Embassy, after the ambassador had already vacated it. This was little more than a patriotic demonstration which resulted in some damage to Russian property—conduct that does not fall within the purview of international law.

In Berlin, the ambassadors of Great Britain, France, and Russia were subjected to treatment that amounted to much more than mere disrespect and discourtesy; it cannot be said that the law of inviolability was throughout strictly observed there. Sir E. Goschen stated that immediately after the British declaration of war "an exceedingly excited and unruly mob" assembled before His Majesty's Embassy in Berlin, succeeded in overpowering a small force of police, and assumed a threatening attitude. Windows of the drawing-room were broken, and stones were thrown in. This misconduct ceased, however, on the arrival of mounted police. Herr von Jagow, the Foreign Secretary, expressed his regret for what had happened, saying "it was an indelible stain on the reputation of Berlin." The following morning the German Emperor sent an aide-de-camp to express his regret, too, for the occurrence. Precautions were then taken for the journey, in order to avoid further disturbance and annoyance. ". . . Beyond the yelling of patriotic songs and a few jeers and insulting gestures we had really nothing to complain of during our tedious journey to the Dutch frontier."<sup>1</sup>

The British Ambassador's departure from Vienna was comparatively free from untoward incident. The only hostile demonstration took place at a railway-station in the outskirts of the capital, where a crowd had collected

<sup>1</sup> Sir E. Goschen to Sir E. Grey, August 8.

to watch the military trains pass, and several spectators and railway employees shouted "Nieder mit England" (Down with England), and threw stones at the train.<sup>1</sup>

It appears from reports that the Russian Ambassadors, during their departure from the hostile countries, fared much worse. Serious personal insults were offered to them and to their suites; and it was stated that they, including distinguished ladies, were even spat at. If this were so, the misconduct amounted not only to a violation of international law, but also to an outrage on fundamental human decency.

According to an article that appeared in the Paris edition of the *New York Herald*,<sup>2</sup> it seems that on one occasion the German Government refused to allow the United States Ambassador at Berlin to communicate by cable with Washington. If such gross interference with the rights of legation of a neutral country really took place, then the reporter's description of it as a "monstrous pretension" and a "suicidal aberration" is scarcely exaggerated, in view of the breach of international law on the one hand, and of the danger of an additional political embroilment on the other.

(b) Another immediate effect of the outbreak of war is the acquisition by a belligerent State of extensive rights over such private property of its own subjects and of neutrals as is found within its territory.

The right of a belligerent over the private property of its own subjects is, of course, outside the domain of international law; it depends, rather, on the very first principles of State existence and self-preservation. The paramount necessity of the collective nation must perforce predominate, in a national crisis, over the personal interests and claims of individual citizens. The application of this principle was illustrated in this country by the taking over of all railways for military purposes, and by the Royal Proclamation requisitioning for the use of the State all

<sup>1</sup> *The Times*, August 20, p. 6.

<sup>2</sup> *Ibid.*, August 13.

means of transport and conveyance. Similarly, possession may be taken of everything else that may be useful for warlike operations, and this—in virtue of the principle of solidarity between Government and people—without any legal compulsion to pay any indemnity. Further, at a time when war is imminent, the Government authorities are entitled to prohibit all persons within the jurisdiction from exporting all articles directly useful in war. Thus, just before the declaration of war was announced, a Royal Proclamation was issued forbidding the export from this country of numerous commodities that belong to the class of absolute contraband. The property of neutral individuals which is permanently situated in belligerent territory is, equally with the property of subjects, liable to be seized, used, or destroyed if urgent military interests demand; and there is no legal duty to pay compensation, though this might well be done as an act of grace.

In the case of neutral property that is only temporarily or accidentally situated within his territory or control, a belligerent has also the right to use or destroy it for reasons of public necessity, provided he is prepared to pay for it a proper indemnity. This particular right of a State at war is sometimes designated the right of angary ("droit d'angarie," from the *ius angariæ* of Roman jurisprudence, under which provincial governors were entitled to take possession of means of transport). Formerly, European sovereigns asserted in time of war a special prerogative, whereby foreign vessels found within their territorial waters were liable to be impressed for purposes of transport. We find treaties regulating such practice as late as the eighteenth century; and though the right is not yet altogether alien to theory, so far as present usage is concerned it may perhaps be considered as obsolete. The modern form of the right of angary, however, is exemplified in this war. Four large men-of-war lying, in course of construction, in British dockyards, and destined for the neutral States of Chile and Turkey (which was then neutral), were taken over by the British Government. The Porte protested against

this action as being contrary to international law. But it is not contrary to international law; it is a universally recognized practice, and is in perfect accordance with the law of nations. The British Government replied that considerations of public interest necessitated the appropriation, and that full compensation would be made. It may be added that this right of angary, in reference to the employment of railway material belonging to neutral States or their subjects, is specifically recognized by the Hague Regulations.<sup>1</sup>

One or two notable instances that occurred in the Franco-Prussian War may be referred to. On one occasion the Germans seized a large quantity of rolling-stock belonging to Switzerland, and retained it for a considerable length of time. On another occasion six British vessels lying in the Seine, near Duclair, were sunk by them, because the German general commanding at Rouen wanted to block the passage of the river in order to prevent French gunboats from coming up and interfering with the German operations. In reply to representations from the British Government, Bismarck expressed the regret of his Government, admitted the claims of the owners and the crews to compensation, and declared that if excesses had been committed that were not justifiable by the necessity of defence, the guilty persons would be called to account. At the same time he held that the action was in accordance with the existing right of angary. In their reply the British Government admitted that this contention was legitimate, and merely requested the payment of a proper indemnity, which was afterwards satisfactorily arranged.<sup>2</sup>

(c) Another question arises that is closely related to the right of angary. It is in reference to the position of enemy vessels in belligerent ports, either when war has been declared, or when it appears imminent. The principle here involved is that of the old practice of hostile embargo. This is to be distinguished from civil or pacific embargo,

<sup>1</sup> The Hague Convention (1907), No. v. Article 19.

<sup>2</sup> Cf. *Parliamentary Papers*, 1871, vol. lxxi.; *Annual Register*, 1870, p. 110.



which means the detention in port of ships, whether belonging to the subjects of the detaining State itself or to neutrals. Thus in 1807 the United States prevented her own merchantmen from leaving their respective ports, in order that they might keep clear from the action of English and French cruisers.<sup>1</sup> In the American Civil War a British merchant vessel, the *Labuan*, was detained by the United States to prevent her from divulging information as to a certain military expedition that was in course of preparation ; but an indemnity was afterwards paid.

Hostile embargo may be applied, in the first place, by way of reprisals, when one State feels itself aggrieved against another to which the detained vessels belong, and thus seeks to obtain some reparation for injuries received. In the second place, according to earlier usage it could be applied in view of war. When a country was suspected of warlike intentions, its property might be kept back for the time being by way of precaution. If hostilities supervened, the original act of seizure had retroactive effect, and became an act of capture. Thus in 1803, on the rupture of the Peace of Amiens, Great Britain, suspecting that Holland contemplated joining France against her, laid an embargo on all Dutch vessels in British ports. Soon afterwards war broke out, and the question of the seizure came before the Prize Court. Lord Stowell—the greatest judge that ever adjudicated on questions of international maritime law—declared that the seizure, having been made on the supposition that hostilities might break out, was in the first instance equivocal ; that if reparation had been made and friendship restored between Great Britain and Holland, the original seizure would have been simply a case of temporary detention, a mere civil embargo ; but considering that war broke out between the two States, this sequestration was transformed into a belligerent capture.<sup>2</sup> However, until regulations were laid down by the Hague Conference in 1907,

<sup>1</sup> J. B. Moore, *Digest of International Law*, 8 vols. (Washington, 1906), vol. vii. p. 143.

<sup>2</sup> *The Boedes Lust*, 5 C. Rob. 246.

this practice of immediately sequestering a captured enemy merchantman found in a belligerent port at the outbreak of hostilities was generally discontinued for about half a century. From the middle of the nineteenth century it became customary to allow enemy vessels a certain length of time in which to depart on their homeward voyage. In the Crimean War a period of six weeks was allowed by Great Britain, France, and Russia. Similar concessions were granted by Prussia in 1866, by France and Prussia in 1870, by Russia and Turkey in 1877. In the Spanish-American War, 1898, Spanish merchant vessels in American ports were allowed a month in which to load their cargoes and depart; and in the Russo-Japanese War, 1904, each belligerent gave the enemy's merchantmen an opportunity—though not very liberal—of leaving port without molestation. Notwithstanding such frequent practice, it cannot be strictly said that these relaxations were consequent on any definite obligation imposed by international law. They were simply acts of grace exchanged between the contending parties; so that the right of seizure and confiscation still remained.

In 1907, however, the sixth Convention of the Hague Conference introduced certain modifications, some of which are progressive, and others distinctly reactionary, as will be seen from the following articles:—

ARTICLE 1.—When a merchant ship belonging to one of the belligerent Powers is found, at the commencement of hostilities, in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable term of grace, and to proceed, after being furnished with a pass, straight to its port of destination or to some other port indicated to it. The same rule shall apply in the case of a ship which, having left its port of departure before the commencement of the war, has entered an enemy port in ignorance of hostilities.

ARTICLE 2.—A merchant ship which, owing to circumstances beyond its control ("force majeure"), may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed

to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war without payment of compensation, or he may requisition it on payment of compensation.

ARTICLE 3.—Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war.

ARTICLE 4.—Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained, and restored after the war without indemnity, or to be requisitioned on payment of indemnity, with or without the ship. The same rule applies in the case of cargo on board the vessels referred to in Article 3.

ARTICLE 5.—The present Convention does not refer to merchant ships whose construction indicates that they are intended to be converted into warships.

From the above regulations we see that though the right of confiscation is abolished, it is not obligatory to grant a term of grace at all. A belligerent may detain such vessels till the end of the war without compensation, or requisition them on payment of compensation, or in certain cases destroy them if compensation is paid and provision made for the safety of the persons on board and the preservation of the ship's papers. Germany and Russia made reservations against Article 3, on the ground that only States possessing naval stations in different parts of the world could take such vessels into port; others would have to destroy them, and so burden themselves with pecuniary liabilities.<sup>1</sup>

<sup>1</sup> Cf. *German White Book*, December 8, 1907, p. 9.

The United States refused to be a signatory to this Convention,<sup>1</sup> because she considered it an unsatisfactory compromise, marked by a retrogressive character. It was also thought that the provision in Article 3 was a reactionary one, which made ignorance of the outbreak of hostilities a condition of immunity.

Having considered the old rules and the present regulations on the subject, let us look at one or two incidents in the present war, and how the existing rules were applied to them.

In conformity with Article 1 of the above-mentioned Convention, the British Government resorted to the milder usage therein recommended. An Order in Council, issued on August 4, the date of the declaration of war, gave such enemy merchant ships in English ports as were under 6,000 tons in burden ten days in which to load or unload and depart. But as the new usage recommended was merely a "desirable" one, that is optional, the operation of the Order was conditional on Germany's allowing to English ships in German ports a similar period of grace. The German Government, however, failed within due time to give the required undertaking, and therefore Great Britain resumed the right to seize all German vessels found within her jurisdiction at the commencement of hostilities. On the contrary, the Austrian Government agreed to such reciprocal treatment, and so enjoyed the benefit under the regulations.

On August 4, 1914, the *Chile*,<sup>2</sup> a German merchantman without cargo, arrived in the port of Cardiff. After her arrival, war broke out on the same day between Great Britain and Germany. The following day she was seized by the Customs officers. Failing assurance of reciprocal treatment on the part of Germany, according to the above Order in Council, the Prize Court made an order, September 4, merely for her detention, and not for her condemnation.

<sup>1</sup> See J. B. Scott, *The Hague Peace Conferences*, 2 vols. (Baltimore, 1909); vol. ii. p. 568.

<sup>2</sup> 81 *Times Law Reports*, 3.

In the case of *The Perkeo*, however, full condemnation was pronounced. As the vessel was taken at sea by an English cruiser on the outbreak of war, Article 3 of the Convention applied to it. But Germany, having made a reservation as to the article, was not entitled to the benefit of it in this war.

The case of *The Möwe*<sup>1</sup> was heard in the Prize Court on October 29 and November 9. A German sailing-vessel was captured by H.M.S. Ringdove, August 5, immediately after the declaration of war, in the Firth of Forth, and was taken to Leith. The enemy owner claimed exemption under Article 1 of the Convention, on the ground that the ship was within territorial waters and "in port," and not at sea, at the commencement of hostilities. It was held by the Court that the word "port" in the said article must be construed in its commercial sense, as a place where ships come to load and unload, and does not mean fiscal port; so that a ship taken after the outbreak of war in the Firth of Forth outside the port of Leith, though still in territorial waters, was liable to condemnation, and not merely to detention.<sup>2</sup>

In the above case the President remarked that, owing to the non-ratification of the Convention by some of the belligerents, and also the reservations, for example, to Article 3 and part of Article 4 by Germany and Russia, it was not clear whether it was, strictly speaking, binding and applicable—that is, apart entirely from the question whether the enemies of this country were acting in accordance with it.

It will be of interest here to refer briefly to a Belgian case. At the outbreak of war, the Belgian Government gave three days of grace to a number of German vessels that were lying in the port of Antwerp. As advantage was not taken of this, the Belgian authorities seized the vessels. At the Prize Court, set up at Antwerp, the State representative asked for an order for their confiscation,

<sup>1</sup> 81 *Times Law Reports*, 46.

<sup>2</sup> For other cases of maritime capture on the high seas, and for some details regarding the modern Prize Court, see *infra*, Chap. XIX.

on the ground that they were not entitled to the immunity under Article 2. On behalf of the defendants, the North German Lloyd Company, which owned the largest of the vessels in question, it was urged that no order for condemnation should be made, because the vessels had been unable to leave the port in consequence of circumstances beyond their control—"force majeure"—and therefore that they ought merely to be sequestered during the war, or allowed a further period of grace. The "force majeure" alleged consisted in the departure of the officers and crews to rejoin their countries' forces conformably to the order for mobilization, and the inability of the company to procure fresh crews in the short term of grace that had been allowed.

The sixth Convention as to the status of enemy merchantmen at the outbreak of war says nothing with regard to the delivery of the cargoes found on them. These may be of an innocent character, and may have been destined for neutral countries. In point of fact many steamers that were detained in different ports of the British Empire were laden with cargoes consigned to our Dominions or to this country. Others also carrying goods consigned to or from British territories sought refuge in neutral ports, and were compelled to remain there. Thus it would seem that all this cargo, owned by British subjects, was liable to be kept in port to no useful purpose, or to be sold in unprofitable markets. Now mere detention of the enemy vessel does not transfer the property in her or in her cargo to the Crown. In the absence of a valid condemnation in a Prize Court, there can at most be only transfer of possession. Accordingly, there was no reason, either in law or in policy, why the Crown should not have relinquished possession of the vessels, and allowed the merchandise to be forwarded to their British and neutral consignees, or returned to their British consignors.

The effects of the declaration of war on commercial intercourse with the enemy, and on the position of subjects of the belligerent States in enemy territory, will be considered in the next two chapters.

## CHAPTER V

### IMMEDIATE EFFECTS OF THE OUTBREAK OF WAR— POSITION OF ENEMY SUBJECTS IN BELLIGERENT TERRITORY—RESTRICTIONS—INTERMENT

THE declaration of war has an immediate effect on the status of enemy aliens. In view of the regulations that have been made on this subject in this country and in the other belligerent States, it will be of interest to recall previous practice. There is not now, and there never has been, a definite rule of international law with regard to this question, so that we find that measures taken by States in earlier times show no consistency and uniformity, but vary, rather, according to circumstances and to the existing treaties between them. In the Middle Ages enemy aliens, who were merchants, were generally permitted to depart, after due notice had been given them, and to take with them their property or dispose of it. Magna Charta provided for the security of foreign merchants, both in person and in property; it prescribed their attachment, however, until it was ascertained how English merchants were treated by the enemy. When on the outbreak of war in 1242 Louis IX arrested English merchants, Matthew Paris described his conduct as a stigma on the ancient dignity of France. Sometimes a period of forty days was allowed in which resident enemy merchants were to depart, as in the reign of Edward III by the Statute of Staples, and by an ordinance of Charles V of France. Specific treaties were not infrequently made between sovereigns to safeguard their respective subjects who visited or were resident in each other's country. Thus, in 1483, France and the

Hanse Towns agreed to allow merchants to remain a year after war broke out between the contracting parties; and in the seventeenth century we find the period of delay as long as two years. In 1666 Louis XIV issued a proclamation allowing Englishmen three months in which to depart with their goods. The next step taken was to extend the scope of treaties, so as to include not only merchants but all enemy subjects; and afterwards treaties came to stipulate the permission to reside during good behaviour. In the agreement between England and the United States, 1795, all enemy subjects obtained the privilege of remaining in the respective countries and continuing their trade there so long as they behaved peaceably; but should their conduct be open to suspicion, and if it were deemed desirable to order them to remove, a period of twelve months should be granted for the purpose.<sup>1</sup> The term allowed varied in different treaties; thus in that between France and Mexico, 1886, it was no more than "un délai suffisant."

Apart from the relaxations established by such treaties, which of course benefited only the subjects of the contracting parties, earlier theory for the most part held that alien enemies might be arrested and kept till the end of the war, as Grotius says, in order to lessen the strength and resources of the adversary.<sup>2</sup> A century and a half after Grotius, Moser, a distinguished German jurist and prolific writer, declared that a sovereign had the right to do so.<sup>3</sup> Bynkershoek, an eminent judge and international jurist of Holland, also admitted the right, but stated that it was in his time (1737) rarely exercised.<sup>4</sup> But Vattel, a great French reformer of the law of nations, insisted that the sovereign was not entitled to detain them, that they came on the public faith, and that permission to reside implied

<sup>1</sup> Cf. G. F. de Martens, *Recueil des principaux traités* (1791-1801), vol. v. p. 684.

<sup>2</sup> *De jure belli ac pacis* (1625), iii. 9. 4.

<sup>3</sup> J. J. Moser, *Versuch des neuesten Europäischen Völkerrechts*, 10 vols. (1777-80), vol. ix. i. 49.

<sup>4</sup> *Quæstiones juris publici*, I. c. 8.



a tacit guarantee of liberty to return, for which purpose a prescribed term must therefore be accorded.<sup>1</sup> It cannot be said, however, that the indulgence advocated by this great writer was imposed by international law.

What has been the actual practice in previous wars? In 1756 England allowed French subjects to remain; similarly in the case of Spanish subjects in 1762. In 1798 aliens restriction laws were passed in the United States during the undeclared war with France. In the Crimean War, Great Britain and France allowed Russian subjects to remain. In 1861 the Confederate Government ordered the expulsion of all alien enemies. In the Franco-Prussian War, 1870, the Government of the National Defence in France expelled all Germans from Paris and the Department of the Seine, on the ground that this action was necessary as a precautionary measure. When war broke out there were more than 100,000 Germans in France, of whom some 35,000 were found in Paris alone. At first an Order was issued permitting them to remain if they were of good behaviour.<sup>2</sup> But in view of the rapid invasion, the threatened siege of Paris, and the increasing danger, the privilege was taken away by a decree of August 28, so far as the German residents in the Department of the Seine were concerned. To many of these permits were granted; the others were repatriated through neutral diplomatic channels. At the end of the war Germany evidently assumed—and wrongly so—that France had exceeded her rights, and claimed a hundred million francs in the war indemnity for injury to the expelled German subjects. In the Græco-Turkish War, 1897, Greece allowed Turkish subjects to remain conditionally on good conduct, but the Ottoman Government issued an Order calling upon Greek subjects in Turkish territory to withdraw—though the execution of the Order was postponed from time to time, and the war ended before the expiration of the period of grace that had been finally fixed. In the

<sup>1</sup> *Droit des gens* (1758), iii. 4. 68.

<sup>2</sup> *Moniteur Officiel*, July 21, 1870.

Spanish-American War, 1898, President McKinley, acting in pursuance of powers conferred by a statute of 1798, issued a proclamation authorizing Spanish residents to remain, but warning them that they were objects of suspicion. In the South African War, 1899, most British subjects were ordered to leave the Transvaal and Orange Free State within the space of forty-eight hours. In the Russo-Japanese War, 1904, Russia allowed Japanese subjects to remain in any part of her territory, excepting that of the Far East provinces; on the other hand, the Japanese Government made no exceptions whatever, and merely required registration—but it was pointed out that permission to continue residence was an act of grace and conditional on good behaviour. In the Turco-Italian War, 1911, Turks were permitted to remain in Italy; but some eight months after the commencement of hostilities, the Turkish Government ordered the expulsion of all Italians, with the exception of certain classes.

It may be mentioned here that the only modern instance of the arrest of enemy subjects occurred on May 22, 1803, when Napoleon, on the outbreak of war with England, arrested 10,000 Englishmen between 18 and 60 years of age, and kept them in France for many years; some were not liberated till 1814. Napoleon, however, did not allege a right to assimilate such civilians to prisoners of war; he justified his act as one of reprisals in retaliation for England's commencement of hostilities in capturing two French merchantmen without a formal declaration of war.

From the above considerations we may conclude that though there is no definitive international law on the subject, it has become a modern customary rule that enemy aliens may not be arrested, nor their property confiscated, but should be allowed a reasonable time for withdrawal. No aliens of any kind, even friendly and neutral, may claim, as of right, to remain within the jurisdiction; every State, in virtue of its sovereign power, is entitled, if it sees fit, to expel *en masse* all enemy subjects, even if they are established *bona fide* and have acquired a domicile. If

they are not called upon to leave, and are allowed to continue their residence, they should be treated, subject to special restrictions of the municipal law and of Government orders, with moderation, if not on terms of perfect equality with subjects. So long as they remain inoffensive, carefully respect the law, and fulfil other requirements demanded by the interests of public security, they ought not to be treated as enemies, or even as though they were prisoners of war. When an order for a general withdrawal has been made, the immunity will not necessarily apply to those who stay beyond the period fixed, or to such as enter the country afterwards. They may, of course, be removed in any case from certain specified districts, and taken to localities at a distance from the theatre of war or from the scene of military operations. Those who voluntarily remain after permission to withdraw has been granted to them may legitimately be obliged to take an oath to abstain from all hostile acts and from all proceedings that may be in any way either injurious to the State under whose protection they remain or advantageous to the adversary. Moreover, in case the forces of their own State should invade the country they continue to dwell in, they must not join the invaders or aid them in any manner whatsoever. Such conduct would be a violation of the local allegiance due from them, and would be punishable as high treason after the withdrawal of the invaders. Thus, one De Jager, a burgher of the late South African Republic but resident in Natal, when the South African War broke out, associated himself with the Boer forces from October 1899 till March 1900, whilst they were in occupation of that part of Natal in which he had resided. After that he went to the Transvaal, and took no further part in the war. He was tried in March 1901, convicted of high treason, and sentenced to five years' penal servitude and a fine of £5,000, or, failing payment, to an additional term of three years.<sup>1</sup>

Whether an exception to the rule of free withdrawal is to be made in the case of such enemy aliens as are liable to

<sup>1</sup> *De Jager v. Attorney-General for Natal*, L. R. (1907), App. C. 826.

military service is a question depending on considerations of public policy, military necessity, and reciprocal treatment by the hostile Government. In time of peace no State is obliged, apart from special treaties, to surrender aliens to their country; in time of war there is still less obligation to do so. No State, as a modern French writer on international law says,<sup>1</sup> can be bound to render it easier for its enemy to acquire greater resources, and increase his means of conducting belligerent operations. No State is obliged to facilitate in any way whatever the augmentation of the enemy's armed forces; and especially so is this the case where the enemy subjects, who belong to those armed forces, have stayed in the country, know its topography, the character of the different districts, and can therefore serve as guides, scouts, etc. But from the practical point of view so many serious difficulties are involved, that their detention has been condemned in several quarters. That no definite principles can be laid down in the present circumstances of universal military service obtaining in most European countries, and that the deciding factor in each case will have to be expediency, is shown in the present war.

On the day following the declaration of war, namely August 5, the Aliens Restriction Act<sup>2</sup> was passed which put into statutory form some of the principles stated above, and introduced in addition various new regulations. Owing to the extensive diffusion of German subjects, the existence of large numbers in this country, and the extraordinarily elaborate net of espionage spread everywhere by their authorities, it was obviously incumbent on the British Government to lay down drastic provisions. The exigencies of war and the "imminent national danger or great emer-

<sup>1</sup> H. Bonfils, *Droit international public* (Paris, 1908), § 1053. Cf. W. E. Hall, *International Law* (Oxford, 1909), pp. 386-7; C. Calvo, *Le Droit international* (Paris, 1896), vol. ii. p. 37.

<sup>2</sup> Cf. *Manual of Emergency Legislation*, edited by A. Pulling, p. 6. (This is a convenient collection of the enactments, proclamations, and orders arising out of the state of war.)

gency " constitute a perfectly valid and legitimate justification for the comprehensive nature of the step taken. The Act empowered the King in Council to impose on aliens whatever restrictions might be deemed necessary to prohibit them from landing on our shores, to provide measures for deporting aliens resident in the United Kingdom, or to require such aliens as were permitted to remain to comply with any regulations that might be made with regard to registration, place of abode, travelling, or otherwise. These powers supplemented the existing powers concerning the immigration or expulsion of undesirable aliens, which remained in force as before.

The Act was immediately followed by an Aliens Restriction Order which gave effect to the statutory provisions. Part I. enumerated some thirteen "approved" ports at which subjects of neutral countries might freely land, or from which they might leave the kingdom; all other ports or places were declared to be "prohibited" ports for the purposes of the Order. But alien enemies were forbidden to leave or land even at any of the thirteen approved ports, unless they were provided with a permit issued by the Secretary of State for Foreign Affairs. There were also certain restrictions as to the landing of aliens having in their possession firearms, etc., inflammable liquids, signalling apparatus, carrier or homing pigeons, motor cars, motor cycles, aircraft, a cipher code. A Secretary of State was empowered to make at any time a deportation order for the removal of any alien whatever, and where such an order was made the alien in question might be kept in custody pending the departure of his ship. Part II. enabled a Secretary of State to require any alien enemy to reside in such place or district as was specified in the Order. But in any case no alien enemy was permitted to take up his abode either permanently or temporarily in any of the prohibited areas mentioned in the Order, which included practically all the coast districts, unless he was provided with a permit issued by the registration officer of the district. Every alien, whether belonging to a neutral country or otherwise,

who was resident in a prohibited area, together with every enemy alien, wherever he was resident, was called upon to register himself in his district and to give notice of any intended removal or change of residence; and where an alien was lodging with any other person or living as a member of another person's household, the notice to the registration officer was to be given by such person. No alien enemy was permitted to travel more than five miles from his registered place of residence without a special permit. No alien enemy was allowed to have in his possession firearms, motor cars, motor cycles, or any inflammable spirit, etc. A search warrant authorizing any constable to enter premises at any time might be issued by a justice of the peace when satisfied by information on oath that there was reasonable ground for suspecting any contravention of these provisions; and in case of great emergency, similar authority might be given by a written order issued by a superintendent or inspector of police. Any constable or alien officer could without warrant arrest any person who acted in contravention of any of the provisions, or was reasonably suspected of having so acted or being about to act. The penalty for every contravention was a fine not exceeding £100, or imprisonment for a term not exceeding six months; and in addition to this penalty recognizances with sureties might be required.

There were other regulations as to aliens; but the above rules will suffice to show the application of some of the fundamental principles presented above.

Soon after hostilities broke out the question was raised as to the exchange of detained or interned civilians. A statement was made in Parliament, August 31, to the effect that German women and children were permitted to leave the country freely since the war began. Men were not allowed to depart, but suspects alone were interned. It was then suggested that in order that a proper scheme for the exchange of non-combatants might be carried out, women, children, and also men not liable to military service should

be allowed to leave any part of Germany, and not only certain limited districts. Through the American Ambassador, the German Government agreed to allow British subjects to leave Germany, if the British Government allowed German subjects to leave the United Kingdom. It was decided to take up this offer, except as concerning persons under duty of military or naval service, persons of military age who were not prepared to give an undertaking not to accept such duty on their return, and also persons held in custody in this country for sufficient cause. (One Member of Parliament doubted—and with good reason—the advisability of demanding or accepting an assurance from German subjects as to whether they would or would not take part in the war.) Accordingly, the United States Ambassador was asked to communicate to Berlin that His Majesty's Government were willing to permit the return to Germany, subject to reciprocal treatment for British subjects in Germany, of (a) women and children, (b) males under 16 or over 44, and (c) males between these ages provided they were not then liable to military service, and would before leaving engage to take no part, direct or indirect, in the operations of war. It was further stated that as the Austro-Hungarian Government were disposed to give facilities for British civilians to proceed to Italy or Switzerland, a similar offer was therefore conveyed to them through the American Embassy.

A fortnight later (September 14) it was stated in the House of Commons that Germany refused to allow British subjects of military age who were not under duty of military service to leave on giving an undertaking not to take part in assisting in the operations of war. On November 8 the following statement was issued by the Foreign Office:—

“Arrangements have been made with the Austro-Hungarian Government whereby women and children, male British subjects under 18 and over 50 years of age, together with doctors, ministers of religion, and invalids even within these age limits, are allowed to return from Austria or Hungary in return for reciprocal treatment here. Inquiries are

being made as to the number of Austro-Hungarian subjects in the British Isles of military age who have not undergone military service, and when these are completed proposals will be made for the exchange of those persons for the same number of British subjects of a similar nature who are now detained in Austria-Hungary. German women and children have been allowed to return from Great Britain to Germany since the war began, and British women and children have been allowed to return from Germany since September 14. . . . An agreement has also been made permitting the reciprocal return of the male subjects of both countries under 17 and over 55, and of doctors and ministers of religion. In spite of this agreement, which was completed on October 22, four very elderly invalid retired officers, two clergymen, and a doctor are still being detained at Bad Nauheim or Frankfurt, and several protests against their detention have been made through the American Embassies in London and Berlin. Proposals were made a month ago for the exchange of invalids by the British Government, and of persons who, owing to weakness or physical disability, were not likely to make useful soldiers, as well as of all persons who had not undergone military training. These proposals have been refused."

In order to facilitate the repatriation of interned civilians of the belligerent countries, that is, women, children, and men not liable to military service, an office was opened in Berne, September 26. The Swiss Government undertook to act as an intermediary between the various Powers concerned.

The steps taken in Germany with respect to enemy aliens are illustrated by the following notice on a printed form sent to a Russian lady who was unable to leave the country after the outbreak of war :—

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"OFFICE OF THE ROYAL LANDSRAT,

"August, 1914.

"As a foreigner you have no claim to residence or protection in the German Empire. For the present, however, unless the General in Command dispose otherwise, your



deportation will be suspended, on the explicit condition that you do not leave the district of ——— without permission from the police, that you will apply yourself with all your strength to whatever work is assigned to you by the local police authorities at the customary local rates of wage, and that you will abstain from any action which may be regarded, for whatsoever reason, as opposed to the interests of the State. Failure to comply strictly with any one of the above conditions will expose you to immediate arrest.”<sup>1</sup>

One particularly hard condition is to be noted in the above. It is not unreasonable to expect a detained person having no means of support to do, at a fair rate of payment, a certain amount of work suited to that person's station and physical capacity. But to allow the police arbitrary powers to impose such tasks as they think fit is scarcely consistent with fair and humane treatment. However, whilst accounts reached this country of severe treatment of British subjects in Germany, there were several reports of kindly conduct towards those who could not or were not allowed to leave.<sup>2</sup>

On November 6 an official statement issued in Berlin complained that the detention by Great Britain of German subjects of military age was contrary to international law. But as we have shown above, such practice is not in contravention of international law—for the simple reason that there is no definite rule of international law on the question. Moreover, the practice is not unjust on moral grounds; the adversary was not suddenly taken at an unfair disadvantage, and he was at liberty to adopt similar measures in his own country. “The treatment in England of Germans,” said the announcement, “between the ages of 17 and 55 who are fit for military service, which is contrary to international law, made it incumbent upon the German

<sup>1</sup> *The Times*, September 22, p. 11.

<sup>2</sup> For examples of considerate treatment, see *ibid.*, August 18, p. 5; September 28, p. 11. For cases of harsh treatment see *ibid.*, September 12, p. 10; September 25, p. 6.

Government to inform the British Government that British subjects in Germany of military age would be arrested if the German nationals in England were not released by November 5. The British Government did not reply to this declaration, and consequently the arrest of English males in Germany between the ages of 17 and 55 has now been ordered. This order provisionally includes only the nationals of Great Britain and Ireland, but the order will be extended to British colonials, if the Germans living in British colonies are not set free."<sup>1</sup> Immediately afterwards British subjects were arrested in Berlin, and before being sent to a concentration camp they were taken to the city prison, where they were allowed to bring bedding, toilet necessities, and clothing.

Certain officials of the American Embassy in London paid a visit of inspection to the great concentration camp at Ruhleben in the suburbs of Berlin. They reported<sup>2</sup> that they found there 3,500 British male subjects. The German Government had not arrested invalids, and natives of certain British colonies in which there had been no arrests of German subjects; and they made exceptions also in the case of British residents of long standing, and British residents who had married German wives. The report stated further that the place was clean and sanitary, and the accommodation good; that the interned prisoners were permitted to bring provisions in addition to the rations supplied.

With regard to the position of enemy aliens in Russia, certain regulations were laid down by an Imperial Ukase of August 10, 1914. It was therein declared that all immunities and privileges granted to subjects of hostile States on the principle of reciprocity were discontinued; that alien enemies, both in military service and liable to be summoned for service, were to be detained as prisoners of war; that subjects of hostile States might be expelled from Russia, or detained, or sent to certain provinces of the Empire; and that right of entry into Russian territory would be granted only by special permission.

<sup>1</sup> *The Times*, November 7, p. 7.

<sup>2</sup> *Ibid.*, November 18, p. 7.

It may be mentioned, in conclusion, that during the German invasion of Belgium, and before Ostend had been occupied, the Burgomaster of the latter city had a notice posted up, September 5, saying that by order of the Minister of War, all German and Austro-Hungarian subjects were required to leave Belgium within thirty-six hours. An exception was made in the case of families whose sons had performed or were performing service in the Belgian army, on condition that they had no sons then serving in Germany or Austria-Hungary. Those who disobeyed the order were liable to be arrested, and to be tried by court-martial.<sup>1</sup>

<sup>1</sup> *The Times*, September 7, p. 5.

## CHAPTER VI

### IMMEDIATE EFFECTS OF THE OUTBREAK OF WAR— TRADING WITH THE ENEMY—MEANING OF ALIEN ENEMY—POSITION WITH REGARD TO OUR COURTS

WITH regard to the immediate effects of the commencement of hostilities on commercial intercourse between the subjects of one belligerent State and those of the other, it will be convenient to consider the question under three heads, thus: (a) the usually accepted rules prior to the war, (b) acts and orders of the Government after the declaration of war, and (c) by way of illustration, some cases decided in the Courts during the war.

(a) In earlier times there was neither consistent theory nor uniform practice respecting commercial intercourse with the enemy.<sup>1</sup> At the close of the Middle Ages, it was pretty well established, despite not infrequent practice to the contrary, that war declared against a particular sovereign necessarily implied war against all his subjects, collectively or individually, wherever found. The subjects of one belligerent considered themselves free to exercise the right—as it was frequently designated—“*courir sus aux ennemis*,” that is, to destroy their enemies and appropriate their property. Grotius, in the early part of the seventeenth century, admitted the strict legitimacy of the theory, as arising out of the principles of “natural law” (*ius naturale*) and the “law of nations” (*ius gentium*); but he pointed out that through the gradual regularizing of international relationships, and the growing distinction between the combatant portion of a nation and the civilian portion,

<sup>1</sup> Cf. the present writer's *Effect of War on Contracts, etc.* (London, 1909).

it was necessary to mitigate the rigorous theory in accordance with the behests of divine law. Changes gradually came about; such confiscations of private property became less frequent; peaceable subjects of the enemy came to be more and more differentiated from the armed forces. Indeed, war gradually came to be regarded as a relationship between States as such and their fighting elements, and not necessarily as a comprehensive and uncompromising relationship of deadly hostility between all subjects indiscriminately. Accordingly, Bynkershoek, at the beginning of the eighteenth century, maintained that, notwithstanding the existence of war between two countries, commerce might be permitted between their respective subjects, either generally or confined to certain branches of trading; and he declared—what has been considered a profound observation clearing up many seeming inconsistencies—that a state of war and a state of peace might exist at the same time between two nations at war; that is, whilst belligerent operations were in course of prosecution in one place, in another place commercial transactions might be permitted to continue so long as they were not obnoxious to military interests. It seems to be implied in this point of view, however, that war is not being conducted with extreme rigour nor on a large scale. The difficulty, obviously, is where to draw the line. In Bynkershoek's time such practice might have been more possible than it is to-day; now, considering the great changes that have taken place—the widespread commercial ramifications, the rapid means of communication, the extensive military and naval resources, the marked consolidation of nations, the closer relationships between Governments and governed—it could not be possible, except to a certain restricted and clearly-defined extent.

In the meantime practice varied considerably. In the seventeenth century, merchants of Amsterdam claimed the right to continue trading with their country's enemies. In 1675, during the war between the United Provinces and Sweden, there was no cessation of mercantile intercourse

between their respective subjects. The Emperor of the Holy Roman Empire interdicted commerce, but the prohibition related only to certain contraband goods. The formula of "courir sus," in itself fatal to any peaceful transactions whatever, still appeared in declarations of war, but its application became narrower and less severe. In 1672 it was omitted altogether in the declaration of war made by England against Spain. In the treaty of 1785 between the United States and Prussia, which was to be in force for ten years, it was stipulated that in case of war their respective commerce and navigation should not be interdicted. And before this date, about the middle of the eighteenth century, we find here and there publicists, like Bonnot de Mably,<sup>1</sup> who urged the discontinuance of all such interdiction—characterized by the latter as "un reste de notre ancienne barbarie"—on the ground that it was detrimental not only to neutrals involved, but also to the belligerents themselves. Next we find a swing of the pendulum in a contrary direction. In the American Civil War, a special Act was passed prohibiting subjects of the United States from holding any correspondence with the Confederates.<sup>2</sup> In the Franco-Prussian War, 1870, the French Government laid a similar interdict on all contracts, commercial transactions, and correspondence with enemy subjects. And so on in other wars. However, we may say that now there are two main currents of opinion—on the one hand the Anglo-American doctrine, and on the other the Continental, although there are not wanting writers of the one school in favour of the views on this subject of the other. Consequently, owing to the diversity of opinion and practice, it cannot be said that the subject is governed by any rule of international law; on the contrary, as conditions are at present, the matter depends on the municipal law of States. It is, indeed, possible to point to various authorities and to numerous legal decisions where the "law of nations" is spoken of; but in no case and at no date

<sup>1</sup> *Droit public de l'Europe fondé sur les traités* (1748), vol. ii. p. 810.

<sup>2</sup> Cf. Act of February 25, 1863; in *Statutes at Large*, xii. 696.

could it have been strictly and properly said that a rule of general international law—as we understand the term—was then really in existence in reference to commercial intercourse during war. The usage followed by one or two leading States, if not accepted definitely and uniformly by the other civilized States of the world—at all events by the principal countries—cannot be said to constitute international law.

According to well-established Anglo-American practice, then, the doctrine of non-intercourse comes into force spontaneously on the outbreak of war; and in order to continue and legalize any desired commercial relationships specific licences from the Government are necessary. On the contrary, according to the view and the practice obtaining generally in Continental countries declaration of war does not of necessity require a cessation of all trading, for which purpose special prohibitions are essential. Of course, even in the latter case Courts are not debarred from declaring illegitimate—even treasonable—such transactions as enure to the aid of the enemy Government or their armed forces. On behalf of the stricter Anglo-American doctrine, it may be said that the highly complicated character of modern international commerce, its wide network, its manifold implications, and the rapidity of transport, constitute a possible danger to belligerents, who are, of course, entitled to protect themselves therefrom. Where there is a possible conflict between the interests of the Government directing the war and those of the mercantile subjects, the State is necessarily supreme, and individual subjects are obviously obliged to subordinate their own private interests to the public welfare, and do their utmost to promote the cause of the sovereign to whom they owe allegiance. “The whole nation,” said the Supreme Court of the United States, “are embarked in one common bottom, and must be reconciled to submit to one common fate.”<sup>1</sup>

As a consequence of the doctrine of non-intercourse, the

<sup>1</sup> *The Rapid* (1814), 8 Cranch Rep. 155.

British and American Courts have for many years regularly applied the following general rules, subject, of course, to statutory rules and orders issued for a certain occasion and for a certain purpose: All contracts made with the enemy before the commencement of hostilities were not made illegal by the outbreak of war, but rights and obligations under them could not be enforced until the conclusion of peace. Contracts entered into before the war, which would enure to the aid of the enemy or involve any transaction with the enemy, were not merely suspended, but entirely abrogated. In general, any contracts whatever that were incompatible with the objects and operations of war were considered illegal. Such contracts as were from their intrinsic nature incapable of suspension—for example, partnership—were held to be abrogated. All contracts made during the war, with the exception of a class sometimes designated *commercias belli*—for example, ransom bills, bills of exchange drawn by prisoners of war, etc.—were illegal, and hence null and void. Throughout the fundamental criterion of illegality of any transaction was—whether it helped the enemy, directly or indirectly, to add to his resources, material, financial, or any other kind.

But these rules were not thought to be necessarily applicable to enemy aliens permitted to remain within the jurisdiction, so long as it was clear that commercial transactions with them would not, by their results, benefit the enemy Government. Conversely, subjects of a belligerent or of a neutral State residing in the enemy's territory might, though they are not subjects of the enemy, be regarded by that belligerent as possessing enemy character. This point of view involves a distinction between personal domicile and trade or war domicile.

Property supplied in any trade or undertaking in the enemy territory may well be deemed to be stamped with enemy character, regardless of the owner's nationality or personal domicile, in so far as it may contribute to the wealth of the enemy country and to its capacity to wage war. As a recent writer well says: "Such a trade so



carried on has a direct and immediate effect in aiding the resources and revenue of the enemy, and warding off the pressure of the war. It subserves his manufactures and industry, and its whole profits accumulate and circulate in his dominions and become regular objects of taxation in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and its losses."<sup>1</sup> Accordingly it has often been declared in British Courts that a British subject (and in American Courts that an American subject), or a subject of a neutral State, adhering to the enemy—as by voluntary permanent residence, or by trading in the enemy's country—is for practical purposes in the same position as that of an alien enemy, during the continuance of the war. The judgment in a notable case that occurred during the South African War may be recalled.<sup>2</sup> "This is a suit," said the Cape Supreme Court, "for the condemnation of the British ship *Mashona* and a portion of her cargo as prize by reason of her having been engaged, at the time of her capture, in trading with the Queen's enemies. The cargo in question was shipped at New York for conveyance to Delagoa Bay, and was consigned to various persons resident in the South African Republic, with which State Great Britain was at war at the time of such shipment. There is no question of contraband or of the rights of neutrals, the simple question being whether, at the time of her capture at Port Elizabeth, the *Mashona*, which is admitted to be a British ship, was engaged in carrying cargo for, and trading with, the Queen's enemies. The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse

<sup>1</sup> Sir Travers Twiss, *Law of Nations*, 2 vols. (Oxford, 1884), vol. ii. p. 808.

<sup>2</sup> *The Mashona*, *Journal of the Society of Comparative Legislation* (N.S.), vol. ii. (1900), pp. 828-41. Cf. also the judgment of the Court of Appeal in *Janson v. Driefontein Mines Company* (1902), App. C. 484.

between the subjects of the States at war without the licence of their respective Governments. . . . The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity, he is treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and as an enemy of those with whom that Power is at war."

Further, it follows from the rule of non-intercourse and from the character of alien enemies, that an alien enemy was always deemed to be under a disability to sue; he was unable, to use the earlier legal phraseology, to sustain a "persona standi in judicio."<sup>1</sup> But should an enemy be put in the King's peace by means of a flag of truce, or some act of public authority, he would thereby acquire the capacity to sue even during the war.<sup>2</sup> In cases of maritime capture, too, an alien enemy might be permitted to appear in support of a claim, if he showed that his property was immune from confiscation, through the issue of a Proclamation or an Order in Council, or on some other legal ground.

We have already pointed out that the Continental view has, on the whole, been antithetical to that of the British and American Courts; that is, commercial intercourse was not held to be necessarily interdicted on the outbreak of war, But only by special provisions issued to prohibit its continuance. And this view has been held in several quarters to have been confirmed by a rule laid down at the Hague Conference, which (it is claimed) confers on an alien enemy a right to appear in court. This much disputed regulation is to the effect that it is forbidden to declare extinguished, suspended, or unenforceable in a Court of Law the right or rights of action of the subjects of the hostile party.<sup>3</sup> But considering various important circum-

<sup>1</sup> Cf. *The Hoop* (1799), 1 C. Rob. 196.

<sup>2</sup> *Gist v. Mason*, 1 Term Rep. 86.

<sup>3</sup> *The Hague Regulations* (1907), Article 28 (h).

stances, it is extremely doubtful whether it was meant that this rule should possess general applicability; at all events it could hardly have been taken so by the British delegates, who were no doubt fully cognizant of the long-established principles and practice conformably to the common law of this country. The British official opinion, as expressed by the Foreign Office<sup>1</sup> and argued by the Attorney-General, is that the Article in question has reference only to the obligations of an invading commander; and this interpretation is supported by United States authorities, including General Davis, one of the American plenipotentiaries at the Hague Conference.<sup>2</sup> Now the matter is definitely settled—at all events so far as Great Britain is concerned—by a unanimous judgment of the Court of Appeal (given at the end of this chapter), which adopted the latter interpretation.

(b) We have now considered briefly what were the rules as to commercial intercourse in war that were usually acted upon in this country, in the United States, and on the Continent. Let us next see how these rules have been applied in the case of the present war.

Soon after the declaration of war, a Proclamation as to trading with the enemy was issued (August 5).<sup>3</sup> It declared that transactions with or for the benefit of a person in the enemy country that are not specifically prohibited are to be considered permissible. It prohibited, then, the conclusion of new contracts, but did not deal expressly with the performance of existing contracts. Next appeared (August 22) an official announcement interpreting the preceding Proclamation.<sup>4</sup> It set forth the principle of commercial or war domicile as the criterion for determining enemy or neutral character, and accordingly laid down that a foreign trader

<sup>1</sup> Communication made by the Foreign Office to Prof. Oppenheim; cf. *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, vol. v. (1911), pp. 889-891.

<sup>2</sup> See *American Journal of International Law*, vol. ii. (1908), p. 70.

<sup>3</sup> *Manual of Emergency Legislation*, p. 875.

<sup>4</sup> *Ibid.*, p. 877.

who, though he be an enemy subject, resides and carries on business on neutral territory is not to be considered an alien enemy; hence, the prohibition as regards trading with "alien enemies" did not apply to him. Moreover, if a firm whose principal establishment is situated in the hostile territory and has a branch in a friendly country, trading with the branch was made normally legal, provided that no transactions with the principal house of business be involved. Further, it was declared that commercial contracts concluded before the war with firms in enemy territory could not legally be carried out during the war, and that payments under them ought not to be made; there was no objection, however, to making payment where nothing remained to be done except to pay for goods already delivered, or for services already rendered. The English debtor was not placed under any legal obligation to pay during the existence of the war, but it might well be to the commercial interests of this country that he should be free to do so.

Various questions having arisen regarding the Proclamation against trading with the enemy and the subsequent announcement interpreting it, a further notice was issued with regard to the payment of dividends and interest to alien enemies during the war. It was doubtful, for example, whether the declaration of a company's dividend to be paid to its shareholders constituted the conclusion of a new contract. The notice, therefore, prohibited British companies from paying to alien enemies during the war dividends that accrued due since the commencement of hostilities. If they were earned and declared before then their payment would presumably be permissible. But thus to enrich enemy subjects and possibly to augment the resources of the enemy Government would be against public policy; hence the dividends due were to be paid to a bank for the enemy shareholders' benefit, so that they could be claimed on the restoration of peace. Further, the notice directed that transfers of shares and debentures made since the outbreak of war from enemy aliens to friendly or neutral subjects were not to be registered. If the contract for sale

or assignment had been concluded before the war, there seems to be no objection to the registration.

The rules as to trading with the enemy were extended and made more definite by another Proclamation, September 9.<sup>1</sup> To engage in a prohibited transaction was made a misdemeanour punishable either summarily or on indictment, in the former case with a maximum fine of £500 or twelve months' imprisonment, in the latter seven years' penal servitude. Also any goods seized on the ground of having been implicated in the forbidden trade were liable to condemnation by the Prize Court.

The Proclamation, too, reduced the indulgences that had been permitted by the earlier Proclamation and official notice. Debts due to persons in the enemy country before the war were no longer to be discharged. Negotiable instruments held by or on behalf of an enemy were not to be accepted, paid, or otherwise dealt with. This was a protection to English bankers who might be called upon since the commencement of the war to honour bills indorsed to neutral houses by drawers in the enemy country. Further, trading with a branch of an enemy firm was allowed if the branch was situated not only in Great Britain, but also in allied or neutral territory out of Europe; for if the branch were situated on the Continent, there was a strong presumption that transactions with it might enure to the benefit of the enemy country.

Next, the making of certain payments was licensed by the Crown by three Departmental Orders, issued September 22, 23, and 25. By the first Order—which introduced a notable relaxation of the rule of non-intercourse and was calculated to benefit British merchants—the Home Secretary was empowered to authorize certain persons appointed by the Treasury to make such payments and carry out such exchange transactions for the benefit of persons in enemy territory as the Treasury might from time to time sanction, or to receive payment from persons in enemy territory in similar cases. The second Order, issued by the Board of

<sup>1</sup> *Manual of Emergency Legislation*, p. 878.

Trade, allowed British owners of cargo which was then lying in a neutral port in an enemy vessel to pay freight and other charges, in order to obtain possession of the cargo. The third Order, issued also by the Board of Trade, permitted all persons resident or carrying on business in the British Empire to pay in an enemy country, or on behalf of enemy subjects, certain fees in respect of patents and designs.

Again, owing to the continuance of indirect dealing with the enemy, the Customs officers were authorized (October 9)<sup>1</sup> to demand declarations of ultimate destination in respect of all goods, regardless of value, exported from the United Kingdom to any foreign port in Europe, or in the Mediterranean and Black Seas, except the ports of France, Belgium, Russia, Spain, and Portugal. They were also empowered to demand certificates of origin in respect of imports, other than foodstuffs, coming from the ports of the Scandinavian countries, Holland, and Italy, when individual consignments exceeded £100 in value. Goods imported without such certificates could be detained by the Customs officials until an assurance of innocent origin was produced. These requirements, however, did not apply to goods exported or imported under licence, and to goods shipped for the United Kingdom before October 19.

The interdiction of commercial transactions with the enemy was once more extended by a Proclamation, issued October 8,<sup>2</sup> which prohibited the making or honouring of contracts of insurance and re-insurance with or for the benefit of the enemy. It was also expressly forbidden, in respect of contracts of re-insurance current at the outbreak of the war to which an enemy subject was a party, to cede to him or accept from him under such contract any risk arising under a policy entered into after the outbreak of the war, or any share in such risk. Moreover, the general licence to trade with an enemy branch firm situated in British, allied, or neutral territory was withdrawn as to insurance transactions.

Another Order by the Board of Trade prohibited the insurance by English companies of neutral cargoes that

<sup>1</sup> *Manual of Emergency Legislation*, p. 521.

<sup>2</sup> *Ibid.*, p. 580.

were liable to seizure by the belligerents on the ground of contraband, breach of blockade, or unneutral service.

There were other Acts, Orders, and regulations. We need not, however, trouble ourselves with them. The above brief considerations will suffice to indicate how the previously established principles as to trading with the enemy were applied, supplemented, and enforced during the war. The British Government, *more suo*, avoided the introduction at the outset of a comprehensive and systematic legislative scheme. They preferred to adopt piecemeal measures, meeting occasions and demands as they arose. In some respects, such a policy, at a time of stress and strain and uncertainty, is convenient, though the rules thus followed in rapid succession were in many quarters found bewildering by reason of their multiplicity, overlapping, cross-references, and modifications.

(c) Much difficulty seems to have been experienced with regard to the definition of "alien enemy." It has already been pointed out above that, according to our law as it was even before the outbreak of the war, enemy nationality alone was not necessarily the determining factor of hostile character, so far as commercial intercourse was concerned. Our Courts had already drawn a clear distinction between personal domicile and trade domicile.

By the numerous Proclamations and Orders that were issued since the war began, various meanings were attached to the designation "alien enemy." The Aliens Restriction Order of August 5 defined it in the general sense as "an alien whose Sovereign or State is at war with His Majesty." The Patents, Designs, and Trade Marks (Temporary Rules) Amendment Act of August 28<sup>1</sup> emphasized the commercial sense, and therefore included in the category of "alien enemies" not only subjects of hostile States wherever resident, but also British companies controlled by "or wholly or mainly carried on for the benefit of" such subjects. But under the Proclamation of September 9, the term "enemy,"

<sup>1</sup> *Manual of Emergency Legislation*, p. 80.

whilst it was made to include any "person or body of persons resident or carrying on business in the enemy country," expressly excluded "persons of enemy nationality who are neither resident nor carrying on business in the enemy country." Clause 3 of the same Proclamation declared that only such companies as were incorporated in an enemy country were considered vested with enemy character; and clause 6 excluded from the class of "transactions by or with the enemy" any dealings by or with a branch business of an enemy situated in British, allied, or neutral territory. The latter modification of the old strict rule was further qualified in respect of insurance and re-insurance by the above-mentioned Proclamation of October 8, which assimilated such transactions made after that date by or with a local branch to transactions with an enemy.

In *Ingle v. Mannheim Insurance Co.*<sup>1</sup> (October 19), it was held that for the purpose of enforcing a policy of insurance effected before the war through underwriters employed by the Mannheim Company in this country, the defendants were not in the position of alien enemies. The ground of the decision was that the company was not divided from us, as regards this business, by the "war line," which alone, and not necessarily the principle of nationality or of domicile, determined enemy character, at least for commercial purposes.

With regard to trading with the enemy, two or three other cases that came before the Courts during the war may be here referred to.

*Duncan Fox & Co. v. Schrempt and Bonke*<sup>2</sup> (November 18) involved a contract that was concluded between two British firms for the sale of honey to be delivered at Hamburg to a merchant resident there. The goods were shipped in June on a German vessel; and after the outbreak of war the vendors tendered to the buyers the shipping documents, on presentation of which they were entitled under the contract to receive the price of the goods. At common law (as we have explained above) the further performance of the

<sup>1</sup> 81 *Times Law Reports*, 41.

<sup>2</sup> *Ibid.*, 66.



contract, requiring the delivery of goods to an enemy, had become illegal. Moreover, the Proclamation of August 5 expressly prohibited the supply of goods by persons resident in the British Dominions to persons resident or carrying on business in enemy territory. Hence it was held by the Court that the buyers were justified in refusing to accept the tender of the documents or to pay for the goods.

Another case, *Amorduct Manufacturing Co. v. Defries & Co.*<sup>1</sup> (November 19), raised the question whether an English company, whose bulk of shareholders were alien enemies, possessed the legal power to sue. The plaintiffs were a limited company registered here, with an office in London and a factory in Birmingham; but a large number of shares were held by alien enemies resident in Germany. The plaintiffs sued for the price of goods; but the defendants contended that they were precluded from maintaining the action on the ground that a majority of shareholders were alien enemies. The Court held, however, that the plaintiff company, having been registered here according to English law, was an English company, and was not debarred from maintaining an action by reason of the fact that its shareholders, or some of them, were alien enemies who would be incapable of suing.

In *The Continental Tyre and Rubber Co. v. Thomas Tilling*<sup>2</sup> (November 13, 23) the plaintiffs were an English company registered here, and constituted a branch of a German parent company. The bulk of shares were held by the German company, all the remaining shares except one being held by Germans resident in England. The plaintiff company claimed payment for tyres sold and delivered to the defendants before the war. The defendants pleaded that the payment would be illegal, as it would be a payment for the benefit of alien enemies. However, the Court held on the one hand that if the legality of the transaction depended on nationality, the nationality of the plaintiff company was English, and on the other that its legality was recognized by the Trading with the Enemy Act and the Proclamation

<sup>1</sup> 81 T. L. R. 69.

<sup>2</sup> *Ibid.*, 77.

of September 9. Moreover, the case could be decided on a broader ground. It was not against public policy for a British subject to acquire goods from an alien enemy vendor who, along with the disposition of the money, would be under the control of the laws of this country. It was the transmission of the money to the enemy country, not the payment in England or the sale of the goods, that would benefit the enemy.

This case was taken to the Court of Appeal, where the appellants once more contended that the plaintiff company must be regarded as alien enemy, notwithstanding that it was a limited liability company, and urged that the Court should look at the substance and not at the technicalities of the matter. The Lord Chief Justice, reading the judgment of the majority of the Court, asked: Did the character of the company change because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? An English company cannot by reason of these facts cease to be an English company. It is undoubtedly the policy of the law as administered in our Courts to regard substance and disregard form. But substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. Further, under the Proclamation of September 9, the prohibition of payments "to or for the benefit of an enemy" did not apply when payment was made to a company incorporated in this country. To the argument that it would be against public policy to allow the plaintiff company to recover debts during the war, the Court replied that nothing would more easily tend to create uncertainty and confusion in our law than to allow considerations of public policy, as distinguished from law based on public policy, to be a ground of judicial decision. Therefore, the appeal was dismissed.

Lord Justice Buckley, in his dissenting judgment, said that the company was an artificial legal entity, which had no existence apart from its corporators. Though it was legally a British company, it could not correctly be described as a British subject; all the directors and holders of its shares, except one, were Germans resident in Germany. An alien enemy cannot sue, because he cannot approach the King in his Court of law. To say that the six Germans in the present case could approach the King because it was not they, but the British corporation, that approached the King seemed unsound argument. The artificial legal entity had no independent power of motion. It was the corporators who moved. It was the German corporator who, under the corporate name but still German for the relevant purpose of friendliness or enmity, was the person who came. He was German in fact, but British in form. Therefore, thought Lord Justice Buckley, the appeal should be allowed.

In view of these conflicting decisions, we venture to submit that, whilst the judgment of the majority was no doubt correct from a technically legal point of view, the dissenting judgment had so much reason and common sense on its side, that a decision of the House of Lords or an Act of Parliament is certainly called for to adjust in consonance with it the law on the subject. To a mind that pays little homage to legal technicalities, it is obvious that the judgment of the majority causes form and fiction to predominate over substance and reality. Can it reasonably be said that where the persons constituting a certain group are individually incapacitated from suing, the aggregate or the group is capable of bringing an action? To hold the affirmative is almost tantamount to the assertion that a sum total of a number of zeros is equal to a positive quantity.

The question of the *locus standi* of alien enemies came up in several interesting cases. In *Princess Thurn and Taxis v. Moffitt*<sup>1</sup> (October 16), where the plaintiff sought to restrain the defendant from continuing certain alleged libels, the defendant asked the judge to stay the plaintiff's

<sup>1</sup> 81 T. L. R. 24.

proceedings in the action because, among other reasons, the plaintiff was an alien enemy and therefore was debarred from relief. Since the action was begun, the plaintiff (who had been originally, like the defendant, an American subject) had duly registered herself as a Hungarian subject; and she therefore contended that, having complied with the law of this country, and having come under the protection of the Government, she was entitled to sue in the Courts. To this the judge agreed, and observed that the recent Act and Proclamations amounted to a command to enemy subjects to remain in this country and within a particular area. Hence the plaintiff had by her registration under the Act acquired the right to enforce her claim, notwithstanding the state of war between this country and hers.

In *Robinson & Co. v. Continental Insurance Co. of Mannheim*<sup>1</sup> (October 16), respecting a loss under a marine insurance policy, the defendants prayed the Court to stay all proceedings against them during the existence of the war on the ground that they (the defendants) were alien enemies. The judge, however, held that the reason for the rule imposing a disability on alien enemies was that it was against public policy for the Courts to render them any assistance to enforce rights which, but for the war, they would be entitled to enforce to their own advantage and to the detriment of British subjects. "But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy, and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief." Hence follows the right of an alien enemy to defend, for "to allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice." Similarly, it has been laid down in the Courts of the United States that the liability to be sued and the right to defend are inseparable; and that a provision to the contrary would be against law and civilization.

<sup>1</sup> 81 T. L. R. 20.

The case of *The Möwe* heard in the Prize Court<sup>1</sup> (November 9) raised the question once more. An enemy owner of a vessel made a claim of exemption from capture under the Sixth Convention of the Hague (1907). In his judgment the President declared that there was no rule of international law which conferred on an enemy shipowner the right to appear and to be heard in our Prize Courts in support of his claim to exemption from capture. The Court, however, had power to regulate its practice conformably to justice and equity. Therefore, whenever, an alien enemy conceived that he was entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he would be permitted to appear and argue his claim before the Prize Court.

It has been pointed out above that the Continental views as to commercial intercourse with the enemy and as to the *locus standi* of enemy aliens differed in many respects from the British and the American. Accordingly, we find that in the Prize Court set up at Antwerp in November German shipowners were allowed to appear and to plead that their vessels were liable merely to detention and not to confiscation.

We may conclude this chapter by referring to an authoritative judicial decision with regard to the capacity of enemy aliens to appear in our Courts, and the interpretation of Article 23 (h) of the Hague Regulations. The Attorney-General, in his argument before the Court of Appeal, December 7, 1914,<sup>2</sup> urged that the common law rule, whereby an alien enemy was under a disability to sue, was not abrogated by Article 23 (h) of the Hague Convention, 1907. The latter says that it is forbidden "to declare extinguished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party." He contended that these words must be read with their context; and so the clause should be limited to operations in the field of war, and should not be construed as inter-

<sup>1</sup> 81 T. L. R. 46. See also *supra*, Chap. IV. *in fin.*

<sup>2</sup> *Porter v. Freudenberg*; *Kreglinger v. S. Samuel and Rosenfeld*. *In re Merten's Patent*, 81 T. L. R. 162.

fering in any way with the common law rule. It is true, he pointed out, that in France and in Germany the clause was interpreted in a much wider sense; but English and American opinion had been all along opposed to it. Indeed, before the war the Foreign Office informed the German Government that the British Government took the view that our rule of law remained unaffected by the clause, and the German Government, fully realizing that our law did not admit the right of alien enemies to be suitors in our Courts during war, made no protest.

On January 19 the Court of Appeal pronounced a considered judgment of great importance relating to the above questions. The Lord Chief Justice, delivering the unanimous decision of the Court, said that the main questions to be considered were the capacity of alien enemies to sue in the King's Courts, their liability to be sued, and their capacity to appeal to the Appellate Courts, and generally their right to appear and be heard in the King's Courts. The term "alien enemy" used in reference to civil rights and liabilities does not mean simply a subject of enemy nationality, but applies also to a British or a neutral subject voluntarily resident in a hostile country. The test is not nationality, but the place of carrying on business.<sup>1</sup> For the purpose of enforcing civil rights a person may be treated as the subject of an enemy State notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State.<sup>2</sup> Alien friends have been and are still treated in reference to civil rights as if they were British subjects. Alien enemies have no civil rights or privileges, unless they are here under the protection and by permission of the Crown. Under the old common law an alien enemy's goods or debts found in the realm were

<sup>1</sup> *Wells v. Williams*, 1 *Ld. Raymond*, 282; *McConnell v. Hector*, 8 *B. & P.* 118; *Janson v. Driefontein Consolidated Mines* (1902), *App. O.* 484.

<sup>2</sup> *Janson v. Driefontein Consolidated Mines*, *per Lord Lindley*.

confiscable.<sup>1</sup> Whether the right of confiscation was exercised or not, there was no doubt as to its existence.<sup>2</sup> But the severity of the common law rule was in early days relaxed in favour of those who had the King's permission to come here.

Whenever the capacity of an alien enemy to sue or proceed in our Courts has come up for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm. In the case of *Princess Thurn and Taxis v. Moffitt*,<sup>3</sup> it was held that the subject of an enemy State who was registered under the Aliens Restriction Act, 1914, was entitled to sue; this decision is right, as such an alien is resident here by tacit permission of the Crown.

Next was considered the bearing on these questions of Article 23 (h) of the Hague Regulations (1907)—the prohibition to declare abolished, suspended, or inadmissible the right of enemy subjects to institute legal proceedings. The paragraph must be interpreted as it now stands in the ratified Convention, and the intention of its original proposer is immaterial. It cannot be regarded as abrogating the old rule, which is not peculiar to English law, though it has been more prominent here than elsewhere. Apart even from its collocation and extent, this is evident from the very terms of the paragraph. It forbids a "declaration," etc., which cannot apply to England, where there is no room for such declaration; for by the existing English law the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. And this view is accepted by Dr. Sieveking, an eminent German jurist, who says that, though the paragraph was originally intended by its proposer to have a wider application, it is ineffectual in England because it only prohibits an executive authority from declaring that rights

<sup>1</sup> Hale's *Pleas of the Crown*, I. 95.

<sup>2</sup> *Wolff v. Oxholm* (1817), 6 M. & S. 102, per Lord Ellenborough; *Attorney-General v. Wheeden* (1899), Parker's Reports, 267; *Antoine v. Morshead* (1815), 6 Taunt. 288.

<sup>3</sup> 81 T. L. R. 24. See *supra*.

of action are suspended, extinguished, or inadmissible, and no such declaration is required in English law. Further, the context shows that the paragraph relates solely to the conduct of an army and its commander in the field, and not at all to the administration of the law respecting alien enemies at home. It is to be read as forbidding any declaration by the commander occupying enemy territory that will prevent the inhabitants of that territory from using their Courts of law in order to assert or protect their civil rights. "In 1911 the Foreign Office stated publicly that the paragraph has no concern with municipal law. On the eve of the outbreak of the present war the German Ambassador in London addressed a communication to our Foreign Office to this effect: "In view of the rule of English law the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No arrangement was arrived at.

Having disposed of the alien enemy's capacity to sue, the converse case is to be considered—Is an alien enemy liable to be sued in the King's Courts during the war? There seems no possible reason why our law should decree an immunity during hostilities to the alien enemy from the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. This view was adopted in a recent case.<sup>1</sup> To adopt a contrary view would be to convert what is during war a disability imposed upon the alien enemy into a relief to him during war from the discharge of his liabilities to British subjects.

From the conclusion that an alien enemy may be sued, it follows that he can appear and be heard in his defence and

<sup>1</sup> *Robinson & Co. v. Continental Insurance Co. of Mannheim*, 81 T. L. R. 20; cf *supra* p. 109.



may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of Justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice, and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice. It follows equally that when he is sued the Appellate Courts are open to him, if judgment is given against him. It is true that he is the person who may be said in one sense to initiate the proceedings in the Court of Appeal, by giving the notice of appeal which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the Judge in one of the King's Courts has erroneously adjudicated upon it, he is entitled to have recourse to an Appellate Court in order to have the error rectified.

Do these conclusions apply to appeals by an alien enemy plaintiff, that is, a person who before the war was a plaintiff in a suit, and then by reason of his residence or place of business became an alien enemy? As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the Appellate Courts? There is no distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance, and the case of an alien enemy seeking to enforce such right by recourse to the Appellate Courts. In each case he is seeking to enforce his right by invoking the assistance of the King in his Courts. He is the "actor" throughout. He is not brought to the Courts at the suit of another; it is he who invokes their assistance, and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have begun he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. Therefore, if he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

## CHAPTER VII

### COMBATANTS AND NON-COMBATANTS—MARKS OF BELLIGERENT CHARACTER—LEVIES *EN MASSE*—ARMED MERCHANTMEN—CONVERTED VESSELS

(a) In earlier days the unarmed inhabitants of an invaded territory were liable, equally with the armed forces, to severe treatment at the hands of the invader. In ancient and mediæval warfare humane considerations not infrequently prevailed, as a result of conceptions of magnanimity or chivalry on the part of a victorious commander. Enlightened minds, too, had long urged mitigations. Thus at the third Council of Latran (1179), it was held that not only monks and priests, but also travellers, merchants, and all peaceful men should be free from hostile violence. Writers, like Honoré Bonet,<sup>1</sup> insisted that merchants, farmers, shepherds should enjoy immunity; for as they do not bear arms (it was said), and may well be innocent of the cause of the war, there can be no honour in warring *them* down. Others emphasized that even in hostilities against infidel nations, their women and children should be respected.

However, practices in wars fluctuated considerably; and the advance of time did not always bring ameliorations in methods and theories. In such warfare, for example, as that of the Thirty Years War, the conduct of the belligerents showed in many respects a distinctly retrograde character, and sometimes it degenerated into mere barbarism. But in the period that followed, that is, in the latter half of the seventeenth century, the conscience of men began

<sup>1</sup> *L'Arbre des batailles* (end of fourteenth century).

to rebel against such excesses; and, thanks to the influence of noteworthy publicists and jurists on the one hand, and to the more systematic organization of standing armies and military discipline on the other, various relaxations appeared. Thus a distinction began to be made between the combatant sections of a belligerent country, and the non-combatant elements, namely, the civilian population. By the beginning of the eighteenth century, it became a generally recognized rule that the unarmed people of a country should not be subjected to the deliberate attack of the enemy, if they did not take part in the fighting and pursued their peaceful occupations. Only professional soldiers duly authorized by their Government were, as a rule, to be the object of attack. None the less, invaders sometimes impressed local inhabitants into their service, or compelled them to take an oath of fidelity to the invading sovereign.

Next, the idea that war was properly a relation between States or Governments, and not necessarily between all their respective subjects, began to gain ground. Rousseau's exposition of this doctrine, in his *Contrat Social*, was the most notable and exercised great influence. A brief passage may be usefully quoted here, as it foreshadows subsequent conceptions of a progressive character. "C'est le rapport des choses," he observes, "et non des hommes qui constitue la guerre; et l'état de guerre ne pouvant naître des simples relations personnelles, mais seulement des relations réelles, la guerre privée, ou d'homme à homme ne peut exister ni dans l'état de nature où il n'y a point de propriété constante, ni dans l'état social où tout est sous l'autorité des lois . . . La guerre n'est donc point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes ni même comme citoyens, mais comme soldats, non point comme membres de la patrie, mais comme ses défenseurs. Enfin, chaque État ne peut avoir pour ennemis que d'autres États et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer un vrai

rapport . . . Ces principes ne sont pas ceux de Grotius ; ils ne sont pas fondés sur des autorités de poètes, mais ils dérivent de la nature des choses et sont fondés sur la raison." <sup>1</sup>

Some of these fundamental principles were applied in the wars of the nineteenth century. Wellington left civilians unmolested, and protected them from outrage. In 1814 he informed the inhabitants of Southern France that they would be immune from attack if they remained genuinely peaceful, but that if they wanted to take part in the fighting they must openly join the ranks of their country's armies.<sup>2</sup> In the latter half of the century the distinction between combatants and non-combatants was regularly observed. Thus McLellan, when he entered Western Virginia in May, 1861, observed in the course of an address to his men : " I place under the safeguard of your honour the persons and property of the Virginians. I know you will respect their feelings and their rights." <sup>3</sup> Lee's General Order of June, 1863, pointed out to the Confederate soldiers that their war was only against armed men, and that the duties imposed by civilization and Christianity were just as binding on them when they entered enemy territory as they were in their own country.<sup>4</sup> The proclamation of Prince Frederick Charles on his invasion of Saxony, 1866, stated that he was not making war against the people and the country, but only against the Government.<sup>5</sup> In August 1870, the King of Prussia likewise proclaimed : " I make war against French soldiers, not against French citizens. The latter will therefore continue to enjoy security for their persons and property, so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my

<sup>1</sup> *Contrat Social*, Book I. chap. iv.

<sup>2</sup> Cf. Wellington's proclamation of April 1, 1814, quoted by Sir E. Creasy, *First Platform of International Law*, p. 480.

<sup>3</sup> G. B. McLellan, *McLellan's Own Story*, pp. 51, 52.

<sup>4</sup> Gen. J. B. Gordon, *Reminiscences of the Civil War*, p. 307.

<sup>5</sup> Hozier, *Seven Weeks' War*, p. 126.

protection.”<sup>1</sup> In the war between China and Japan, 1895, the Japanese were instructed to regard only armed forces as the enemy; and similarly, in the war of Japan against Russia, 1904. In the South African War, General Buller, on entering the enemy territory, proclaimed that the war was not against the people, but against the Government; and Lord Roberts, too, in his proclamation (May 31, 1900), guaranteed the personal safety and freedom from molestation of the non-combatants in the Transvaal, if they did not assist in the operations of the armed forces.

In the meantime, so far as the consensus of opinion of States in general is concerned, there were notable pronouncements, such as that of the Declaration of St. Petersburg, 1868, which emphasized, in its preamble, that the only legitimate object of war is to weaken the military forces of the enemy. In 1874 the Brussels Conference, attended by representatives from fifteen European States, drew up a code of land warfare which, though it was not ratified, commanded great respect and authority, and became afterwards the model for the Hague Conventions dealing with the same subject. Now of supreme importance are, so far as they go, the definitive provisions, laid down at the Hague Conferences, which distinguish between legitimate combatants and those who are not to be considered as forming part of the belligerent forces. Articles 1 to 3 of the Hague Regulations respecting the laws and customs of war on land may be said, then, to constitute the existing conventional law as to the qualifications of the combatant members of a belligerent State. Article 1: The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:—(1) to be commanded by a person responsible for his subordinates, (2) to have a fixed distinctive emblem recognizable at a distance, (3) to carry arms openly, and to conduct their

<sup>1</sup> Cassell's *History of the Franco-German War*, vol. i. p. 41; M. Busch, *Bismarck in the Franco-German War*, vol. ii. p. 189. (For some of the foregoing references to wars, the writer is indebted to J. M. Spaight, *War Rights on Land* (London, 1911).)

operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army." Article 2 (*Levies en masse*): The inhabitants of a territory which has not been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war. Article 3: The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy, both have a right to be treated as prisoners of war.

These conditions were not observed by the Germans in the Franco-Prussian war, although such rules then formed part of the customary international law. They demanded that every prisoner, in order to be treated as a prisoner of war and not as a "war criminal," should prove that he was a French soldier, by showing that he was called out as a member of an organized corps by an order emanating from the legal authority, and addressed to him personally. Every combatant was also required to wear an irremovable distinctive uniform or badge, clearly distinguishable at rifle distance. Such demands were obviously exorbitant and, in days of long-distance firing, absurd. For some time the Germans refused to recognize the belligerent capacity of the French National Guard, the *francs-tireurs*, and the militia, who had all been duly commissioned by the authority of the Government, and properly incorporated into the army. The constitution of a country's army is not determined by international law; it depends entirely on the provisions of municipal law, and is necessarily legitimate, so long as the broad requirements of the law of war are satisfied. In the American Civil War Sherman conformed more faithfully to recognized rules by granting belligerent privileges to voluntary, irregular, or detached bodies of troops, if they were of sufficient strength, and were under a leader holding an order from an army

commander; in other words, he required merely that such bodies of men should be engaged in legitimate military operations, and not behave like lawless bandits and marauders.<sup>1</sup>

It is to be noted that Germany, possessing a large regular army, appears to have adopted an arbitrary attitude with regard to levies *en masse*, which are as old as war itself. Levies *en masse* may be of two kinds: firstly, those organized, equipped, and provided with uniforms or distinctive emblems; secondly, those arising spontaneously, or with the tacit approval of the Government, or in reply to the appeal from the authorities. The members of the second class, which may include the entire population rising on the approach of the enemy, are equally with those of the first to be treated as lawful combatants, if they carry their arms openly and observe the laws of war. Notable instances of the latter kind of levies occurred in Russia (1700) to resist Charles XII, in Prussia (1807) during the Napoleonic wars, in Spain (1808-12), in Russia (1812) to oppose Napoleon, in Prussia again (1813). Notwithstanding such practices and international treaty regulations, Germany, according to her official manual of the laws of land warfare (*Kriegsbrauch im Landkriege*),<sup>2</sup> requires the observance not only of the fundamental conditions as to carrying arms openly and respecting the laws and customs of war, but also of the further qualifications usual for regulars, militia, and organized volunteer corps. Under the Hague Regulations, however, if there has been no time for organization, the ordinary untrained inhabitants of any locality are entitled, in the face of the enemy's invasion therein, to take up arms openly and act either along with the regularly constituted forces or independently, in order to repel the invaders.

These conditions were apparently not considered sufficient

<sup>1</sup> Cf. Bowman and Irwin, *Sherman and his Campaign* (New York, 1865), p. 234.

<sup>2</sup> This has just been translated into English by J. H. Morgan; there has been a French translation by P. Carpentier since 1904.

by the Germans in the present war. The following communications<sup>\*</sup> made, through a friendly Power, to France and Belgium embody in a subtle fashion a mixture of duly recognized principles, and exorbitant claims going beyond the requirements of the law, and actually invoke therefor the authority of international law:—

“(1) To the French Government:

“The German troops report that a people’s war<sup>•</sup> is being organized in France in defiance of international law. The inhabitants of France, under the protection of civilian dress, have treacherously fired upon German soldiers.

“Germany protests against this manner of waging war, which is contrary to international law. The German troops have been ordered to suppress by the most drastic means every inimical disposition on the part of the population. Every civilian who bears arms, every one who disturbs German communications, every one who cuts telegraph wires or causes explosions, or takes an unjustified part in the warfare in any way whatever, will be immediately shot. If the war thus assumes a particularly brutal character, Germany will not be to blame. France alone is answerable for the streams of blood that it will cost.”

“(2) To the Belgian Government:

“The Belgian Government has rejected the sincerely meant offers of Germany to spare its country the horrors of war. It has offered armed resistance to the advance of the German troops that was necessitated by the measures of Germany’s enemies; it was determined to have war. Despite the Note of August 8, in which the Belgian Government states that war would only be carried on by men in uniform, a number of persons in civilian dress took part in the fighting at Liège. They shot at the German troops, cruelly killed and wounded and shot down doctors who were discharging their duties. At the same time the populace of Antwerp barbarously destroyed German property, and butchered women and children in bestial fashion.

<sup>\*</sup> *The Times*, August 28, p. 2, referring to an announcement in the *North German Gazette*.



"Before the whole civilized world Germany demands an account for the blood of these innocent persons, and for the Belgian method of warfare which is a satire on civilization.

"If the war henceforth assumes a cruel character, Belgium is answerable. In order to protect the German troops from the unbridled passion of the people, every person not in uniform whose participation in the fighting is not justified by some recognizable emblem will be treated as outside the law, and, if he takes part in the fighting or disturbs German communications, will be treated as a franc-tireur and immediately shot."

Thus the German commanders at once set at naught some of the opening provisions of the Hague Convention of 1907, and refused to recognize, in the case of Belgium, the belligerent qualifications of the Civic Guard and other combatants coming within the requirements of the existing international law. Their own "Landwehr" could scarcely satisfy the demands they exacted from their adversary. However, owing to the continued outrages against the Belgian civil population, committed sometimes by the German armies by way of "reprisals" and vengeance, and sometimes in pursuance of their arbitrary and far-fetched assumptions as to "war treason" ("Kriegsverrath"), the Belgian authorities were compelled to forgo what was allowed to them by international law, and to disarm and disband the Civic Guard, even in the towns not occupied by the enemy.<sup>1</sup>

The German allegations that the Belgian civil population took part in irregular and illegitimate warfare appear to be unfounded. (Of course, we are not concerned with one or two isolated cases, in which a Belgian civilian here or there fired a shot at the unsparing and devastating invaders.) From the beginning of the invasion of Belgian territory, the Belgian Government posted up every day in each town instructions—which were printed also by the newspapers—warning non-combatant civilians, including

<sup>1</sup> *The Times*, August 24, p. 5.

women, children, and men not authorized to take up arms, not to offer resistance to the invaders.<sup>1</sup> Thus on August 4, the Belgian Minister of the Interior issued a circular to each of the 2,700 Belgian communes, dealing with the duties of communal authorities and the conduct of the civil population. "The fact that the enemy has invaded Belgium," says the circular, "must cause trouble and emotion among the people. The first duty of communal officials must be to warn those over whom they exercise authority of their duties towards their country, and of the attitude which they must adopt towards the invading army. According to the laws of war, armed action—that is to say, resistance to or attack on the enemy, the use of weapons against isolated soldiers of the hostile army, or direct intervention in combats and skirmishes—is never permitted to men who are not embodied in either (1) the Regular Army, (2) the Civic Guard, or (3) bodies of volunteers observing military law, subject to a responsible officer and wearing a distinctive badge. Only such persons are authorized to engage in hostilities. . . ."

The following (together with the foregoing statement) formed part of an official report published January 9, 1915, by the Press Bureau, at the request of the Belgian Legation in London: ". . . A communiqué, issued by the German Legation at Bukarest, and printed in the *Indépendance Roumaine* of August 21 (old style, namely, September 3) not only accuses the Belgian Government of giving the civil population orders to resist and of organizing insurrection against the enemy who had penetrated into our land, but 'more especially of having prepared stores of weapons, in which each gun was labelled with the name of the person to whom it was to be given.' This last detail proves that the weapons in question were precisely those which had been taken away from private persons and were to be given back to them. Is it customary in an arsenal to label each rifle with the name of the soldier who is to receive it? A lie can be recognized at once when it is

<sup>1</sup> *The Case of Belgium in the Present War* (1914), p. 81.

issued with such absurd and contradictory additions." Day by day the following notice was brought to the attention of all: "The Minister of the Interior recommends the civil population, in the event of the enemy appearing in their district—(1) not to engage in fighting; (2) not to use insulting or threatening language; (3) to keep indoors and to close windows, lest they should be accused of provocative acts; (4) to evacuate houses or hamlets which our soldiers are occupying for defence, lest it should be said that civilians have been joining in the firing."

As we have seen, civilians are not necessarily debarred from defending their territory against the approach of invaders, and do not, if they openly play such a part, forfeit the privileges granted to belligerents. The German commanders wrongfully held otherwise, and so, according to their own avowals, were determined to conduct their warfare with unrelenting rigour, and to create examples which, by their "frightfulness," would be a warning to the whole country.<sup>1</sup> It will suffice to mention here one of these examples—a comparatively mild one. It is thus described by a German officer in his diary (under date, August 23) which was found on him on a battlefield<sup>2</sup>: "Our regiment deployed in a little valley leading into the Meuse. . . . Our men came back and said that at the point where the valley joined the Meuse we could not get on any farther as the villagers were shooting at us from ~~every~~ house. We shot the whole lot, sixteen of them. They were drawn up in three ranks; the same shot did for three at a time. Two 6-inch howitzers succeeded in getting into position and in twenty shots reduced the village of Bouvines to ruins. . . . The men were absolutely mad at this sneaking way of fighting. They wanted to burn everything, and they succeeded, too, in setting light to several houses. In the afternoon our artillery fairly sprinkled the principal buildings in the place the whole length of the village with incendiary shells."

One more point remains to be noted in connection with

<sup>1</sup> *The Times*, August 28, p. 7.

<sup>2</sup> *Ibid.*, October 19, p. 6.

this part of the subject. What is the position of the French special corps, known as the "Légion Étrangère," of which we heard something during the war? This "foreign legion" consists of various classes of persons, of foreign nationality or otherwise. In general this corps is liable to be called out only for Colonial operations; but in exceptional cases it may legitimately serve in Continental wars. In the latter case, however, the French Government could not properly compel any of the members of this "legion" to fight against their own country, if they refused to do so. Thus Article 23, *in fin.*, of the Hague Regulations<sup>1</sup> prohibits a belligerent from forcing enemy subjects to take part in operations of war directed against their own country even if they were in the service of that belligerent before the commencement of the war.

(b) Let us turn now to the naval forces employed in the war, and consider, in reference to the status of lawful belligerency, the position of converted merchantmen and of defensively armed merchantmen.

Both kinds were put into use in the present war. The converted merchantmen have achieved a great success; a notable example is the *Carmania*, which fought and destroyed the *Cap Trafalgar*. On the other hand, the arming of merchant vessels merely for defensive purposes has been a subject of controversy; and no international agreement thereon has yet been arrived at.

For some time doubts were expressed also as to the position of converted merchant vessels; some held that they could properly form part of the belligerent navy, others contended that they were not entitled to be treated, if captured, as legitimate members of the fighting forces. At the time of the Franco-German War, the Germans possessing but few men-of-war invited the owners of German merchantmen to make them over for the time being to the German navy, and offered a certain assessed price and the necessary equipment together with a premium if they cap-

<sup>1</sup> Fourth Convention of 1907.

tured or destroyed French vessels. The French Government, however, considered this a privateering scheme, and requested Great Britain to intervene, on the ground that the proposed action was in contravention of the Declaration of Paris, 1856, which had abolished privateering. But Great Britain decided that the project was in effect different from privateering. It was, however, never carried out.

It came to be generally agreed, then, that the employment of a voluntary fleet was legitimate. Several Powers made definite arrangements with shipping companies in order to secure an effective conversion of vessels on the outbreak of war. But practice remained uncertain until the Russo-Japanese War, when matters were brought to a head. In July, 1904, the *Peterburg* and the *Smolensk* of the Russian volunteer fleet, flying their commercial flag, passed the Bosphorus and the Dardanelles which, by the Treaty of London, 1871, were closed to all men-of-war. After passing through the Suez Canal, they mounted guns which had before been concealed, hoisted a war flag, searched the Red Sea, and exercised the right of visit in the manner of regular cruisers. Later one of them captured the British mail-steamer *Malacca* on a charge of carrying contraband, placed a prize crew on board in order to take her to Libau. But Great Britain protested on the ground that the alleged contraband consisted of Government stores consigned to Hong Kong, and contended, moreover, that if these vessels were merchantmen they had no right of visit and search, but if they were warships they had no right to enter the Straits. The *Malacca* was accordingly released, together with other neutral vessels that had been captured, and Russia instructed her volunteer fleet that its status "was not sufficiently well-defined, according to international law, to render further searches and seizures advisable."

In 1907 the Hague Conference agreed (1) that a converted vessel has the rights of a warship if she is placed under the direct authority, immediate control, and responsibility of the Power whose flag she flies; (2) that she must bear all the external marks of the national men-of-war; (3) that her

commander must be in the service of the State, duly commissioned, and his name notified on the Navy List; (4) that her crew must be subject to naval discipline; (5) that the vessel must observe the laws and customs of war, and finally (6) that the conversion must be publicly announced as soon as possible.<sup>1</sup> A most important point that was not settled is the place of the conversion; and at the Naval Conference, 1909, no agreement could be arrived at, some States being against, others for, conversion on the high sea.

At the beginning of the present war, it was reported that a German liner, the *Vaterland*, having left the United States with a number of German reservists, converted herself when outside the United States' maritime jurisdiction into a belligerent cruiser, with the intention of preying upon the commerce of the allied countries. It was also reported that the United States Government despatched a man-of-war to watch this vessel, and ascertain whether the alleged conversion had involved the violation of American neutrality. To make use of neutral ports or neutral territorial waters for effecting such transformation would undoubtedly be an infringement of neutrality and a breach of international law. If conversion on the high sea is to be allowed at all, it should properly be confined to such vessels as had left their country's ports before the outbreak of war, and to vessels captured from the enemy. And when once converted they should remain so for the remainder of the war. Otherwise unrestricted conversion together with unrestricted re-conversion might not only be the means of inflicting sudden injuries on neutrals, but would also be a violation of the law of war which prohibits intermittent belligerency either on land or on sea.

The converted merchantmen, constituting as they do part of the active naval forces during the particular war for which they have been commissioned, are to be distinguished from a class of mercantile vessels, which may be designated defensively armed merchantmen. These are uncommissioned, and remain engaged in trade or in the carrying

<sup>1</sup> Hague Convention (1907), No. VII, Articles 1-6.

of passengers; and simply for their own protection, they carry a number of guns on board. The legitimacy of this practice has recently been questioned in several quarters, notably in Germany.

During the Napoleonic War the British mercantile service usually carried guns and ammunition for purposes of self-defence. The vessels of the East India Company and the Hudson Bay Company were, owing to their adequate armament, exempted from the obligation to sail under convoy. But during the nineteenth century the practice fell into disuse; and it was not revived till quite recently. On March 17, 1913, the First Lord of the Admiralty announced in the House of Commons that up to that date forty ships had been armed with two 4·7-inch guns each, and that shortly afterwards there would be seventy such vessels. The guns and ammunition were furnished by the Admiralty, which also provided for the training of the guns' crews. He emphasized that the guns were mounted in the stern and could fire only on a pursuer. These vessels had nothing in common with privateers; nor were they in the position of warships, as they were not entitled to take part in offensive operations. They would surrender if they were overtaken by the enemy's men-of-war, but would resist an attack by the enemy's armed merchantmen.

The scheme was favourably received by some, but others (especially in foreign countries) criticized it as a policy not only involving undesirable additions to the burdens and operations of maritime war, but also infringing the spirit, if not the letter, of the Declaration of Paris, 1856, which abolished privateering. In 1913 the Institute of International Law thought such measures of self-defence permissible; but Professor Triebel of Berlin contended that an enemy merchantman was not entitled to resist capture, and Dr. Schramm, counsel to the German Admiralty, maintained that such self-defence was illegitimate, and that the crew, unless they were duly enrolled in the naval forces of their country, would be in the position of criminals. However, the better opinion is that if the crew, after offering resist-

ance, are overpowered, they must be treated as prisoners of war. This view is accepted in the Naval Code of the United States. Article 6 of the eleventh Convention of the Hague Conference (1907), which provides for the release of the crew of a captured merchantman, would not apply to the crew of a resisting armed merchantman.

Neutral cargoes found on board converted merchantmen are liable to confiscation or destruction. As to goods found on the enemy's, defensively armed merchantmen there has been a difference of opinion. The British Prize Courts in the time of Stowell regarded them as confiscable, on the ground of the neutral owners' hostile association and intention to resist visit and search.<sup>1</sup> The Supreme Court of the United States adopted a different view, holding that such goods could not be forfeited if their owner did not himself participate in the arming and resistance of the vessel.<sup>2</sup> In any case, if neutral goods are destroyed or damaged through acts committed in the legitimate capture of the resisting vessel, no claim for compensation can be maintained by the owner.<sup>3</sup>

Soon after the outbreak of the present war, Germany complained to the United States that British merchant vessels had taken 6-inch guns on board, whereby they really assumed the character of warships. On September 5, it was reported from Washington that in order that difficulties with regard to neutrality might be avoided, British merchantmen entering American ports must not carry guns.<sup>4</sup> But the United States Government decided subsequently that the merchant vessels of a belligerent might carry armament and ammunition for purely defensive purposes without acquiring the status of warships, provided that the guns were not larger than 6-inch and were not mounted forward.

<sup>1</sup> *The Fanny* (1815), 1 Dodson, 443.

<sup>2</sup> *The Nereide* (1815), 9 Cranch 388; confirmed in *The Atalanta* (1818), 8 Wheaton 409.

<sup>3</sup> Cf. the case in the French Courts, *The Norwaerts*, Dalloz (1872), III. 94.

<sup>4</sup> *The Times*, September 7, p. 6.



## CHAPTER VIII

### FUNDAMENTAL PRINCIPLES OF WAR LAW,—THE GERMAN DOCTRINE OF BELLIGERENT NECESSITY

(a) IN the previous chapters we have dealt with certain contraventions of international law by Germany, for example, the breach of Belgian neutrality, the violation of the neutrality of Luxemburg, the commencement of hostilities before the formal declaration of war had been made, the disgraceful treatment of the Grand Duchess of Luxemburg, the discourteous treatment of some Ambassadors, the refusal to recognize certain lawfully constituted armed forces in Belgium. Now we have come to the actual operations of warfare. And here we have especially to record a sinister catalogue of violations of international law. In view of existing conventions and long-established universal usages we have to present a lugubrious narrative of proceedings that are an outrage on modern civilization, and that are akin to the older barbarous methods of making war which were thought to have been banished from the world for ever. These lawless proceedings, had they been confined to one or two isolated cases, would not have called forth general opprobrium and need not have demanded our protracted attention here. They were unfortunately numerous and grave enough to warrant our examining them in the light of established law. But before we deal with them specifically—and we shall need several chapters for the purpose—it will be well first to consider briefly the fundamental principles underlying the modern law of belligerent operations, next to discuss in relation to these principles the doctrine of “military necessity” as advo-

cated by German writers and commanders, then determine to what extent such necessity may conceivably justify severe measures, and when it is a mere cloak to cover illegitimate acts.

Peace is the normal condition of international relationships. War is a cessation, a disturbance of peace, an abnormal condition. But, though war is an abnormal condition, it is not on that account a condition of lawlessness, of licence, of anarchy. It does not necessarily justify the use of all measures that caprice, vindictiveness, or the possession of superior physical might may dictate. It is primarily a relation between States, or between a State and such subjects of the opposing State as are closely identified with it for military purposes. It is only secondarily, and then only for certain limited purposes, a relation between individuals. No injury should be deliberately inflicted on peaceable individuals, who remain without defence and take no part, overt or clandestine, in the fighting. No injury or damage should be wilfully done to person or property, if the legitimate interests of the combatant are not thereby manifestly served, and the attainment of his essential object, namely the overpowering of the enemy, is not clearly facilitated. The means used for defeating the enemy should be such as involve the least possible sacrifice of life and property on both sides. Next, the principle of humanity should be recognized throughout the whole course of military operations. This prohibits the use of all methods and instruments involving treachery or unrestrained savagery, everything that is condemned by the conscience of civilized mankind, everything that is repugnant to the sense of honour, decency, and fair-play, the use of gratuitous cruelty, the ill-treatment of the helpless and the disarmed, such as wounded and prisoners, outrage on women and children. Belligerents know full well that the realization of their military goal, the predominant aim of the armed conflict, is not rendered more difficult by forswearing such conduct as would always and everywhere stigmatize any one guilty of it. Closely

allied to this principle of humanity is that of chivalry, which calls on a combatant to show generosity and magnanimity at a moment of triumph or ascendancy, and especially if to do so would not endanger the plan of campaign and the accomplishment of the object aimed at. It calls on him, too, to keep his pledged word, even if it should be seemingly to his momentary disadvantage. Again, the principle of military necessity—which is really more or less implied in the principles already mentioned—requires that no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances. Hence the bombardment of a village for the purpose of destroying a few soldiers who are located there is unjustifiable, the shelling of an open maritime town for the ostensible purpose of demolishing a coastguard signalling station is unjustifiable, because the means adopted is out of all proportion to the end in view.

It may be that whereas one belligerent is observing these principles and the various laws of war established as natural corollaries of them, the other is persistently and defiantly disregarding them. What is the first to do, so that the second may be induced to conform to the behests of law and justice? He is then entitled to take additional measures, either different in kind or marked by a greater degree of severity, which are known as reprisals. Such retaliatory acts are admissible only on the authority of the Government or the commander after the truth of the charges against the enemy has been established, and after the enemy has been called upon to cease his unlawful proceedings. The acts of reprisal must not be applied in a purely revengeful spirit; they should be adopted rather to secure redress or to ensure compliance by the enemy with established laws and customs; they must not be out of proportion to the offences committed; and they must not be inconsistent with the dictates of justice and humanity. Is it, then, legitimate to sack a town because one or two of its inhabitants unjustifiably attacked the enemy? Is it

legitimate to impose an exorbitant fine simply because one or two individuals failed to fulfil promptly a certain order? Is it legitimate to arrest hostages and execute them on the mere ground that some of their fellow-citizens, who are beyond the control of these hostages, failed in their alleged duty to the army in occupation? To answer questions like these there is no necessity, indeed, to apply elaborately the fundamental principles we have enunciated; for the answers suggest themselves readily and spontaneously to the intuitive consciousness of every reasonable being.

(b) Now that we have set forth as briefly as we could the governing principles of war law, the principles lying at the very root of rules due to inveterate custom or to deliberate conventions—of the latter we shall have more to say later—let us see what is the German conception of war in general.

A writer of experience observed in a recent article<sup>\*</sup> that lately at Berlin he had an opportunity of ascertaining the views of one whose opinions had a determining influence on German military doctrines. "Any war," said this authority, "between the great Western Powers at the present day can now only be a life or death struggle. No considerations of humanity, of justice, of treaty obligations will interfere with its one great object, which will be to annihilate the enemy's power of resistance. All methods are fair where war is no longer a mere duel, but a death grapple in which, just as teeth and nails are used between individuals, what is equivalent to them is used between nations." Here we have a typical German disciple of Clausewitz. The latter had already taught that war is the application of force unrestrained by any other consideration but that of expediency. The so-called rules and usages of war are to be considered only self-imposed, factitious restrictions that are scarcely worth mentioning; for they cannot interfere with the free use of armed violence. War, according to this school, is essentially rigorous and ruthless.

<sup>\*</sup> Sir T. Barclay, *Nineteenth Century*, December, 1914.

A commander worthy of the name should not be seduced by considerations of benevolence and generosity; the errors that spring from such qualities are the worst of all. The behests of chivalry and Christianity possess no applicability whatever on a battlefield. A true soldier pays no heed to the amount of blood he sheds, and to the suffering and misery he inflicts, so long as he can accomplish his object. All rules enjoining moderation are repugnant to the science of warfare; therefore they are illogical and absurd. Morality is foreign to the sphere of belligerent action; there it is an unwelcome guest, an undesirable interloper that has no concern with the hostile operations of a general and his army. "Military necessity" is the predominating, the exclusively sovereign factor; everything else must be unhesitatingly sacrificed to its demands. An army cannot be said to be acting efficiently unless it constantly seeks to annihilate the enemy—to demolish his material possessions, to crush his physical power, to destroy his intellectual resources, to eradicate, above all, his moral force; in a word, to bring about his entire demoralization. To achieve this desirable object, every kind of intimidation, every form of frightfulness, every manifestation of unmitigated fury and violence are permissible, nay, indispensable.

That these doctrines form part and parcel of the stock-in-trade of German military officialdom is shown clearly by the substance, and still more by the spirit, of the official manual, *Kriegsbrauch im Landkriege*,<sup>1</sup> issued by the Great General Staff for the enlightenment of German officers. The Hague Conference of 1899 succeeded in laying down a large number of rules for war on land, which the Powers undertook to incorporate in their respective Army Regulations. Germany's attitude to the labours, agreements, and provisions of the Conference is shown in her *Kriegsbrauch*. We may say at once that this German Manual of war law embodies, almost literally, the unconscionable doctrines of Clausewitz and his school. A war conducted with energy, it says, is not to be limited to attacks on the armed forces

<sup>1</sup> The edition referred to is that of Berlin, 1902.

of the enemy and his fortifications ; it must also aim at the destruction of the whole of his material, and "moral" or spiritual resources. What is implied in this destruction of the material resources of a country ? "That would imply," says the writer above referred to,<sup>1</sup> "the effective stoppage by bombardment or otherwise, of all its factories and means of production, the burning of its crops, the destruction, where not available for utilization, of its railways, rolling stock, ports, harbours, and canals, the sinking of its ships and barges, the flooding of its mines, the appropriation or destruction of all means of subsistence, food and raw material, beasts of burden and traction, etc." What is implied in the destruction of the "moral" ("*geistige*" is the word in the original) resources ? "This would include terrorizing the population, spreading alarming rumours of possible vengeance, statements false or true as to shooting harmless civilians, rape, child-murder, and so on : the dropping of bombs from aircraft on a crowded city on any pretext whatever, such, for instance, as the mere presence of a sentinel at the entrance to a public building ; firing heavy artillery for the purpose of creating panic—in fact, the employment of every possible method of creating a sense of the hopelessness of resistance."<sup>2</sup> The Manual especially warns officers against the humanitarian tendencies of the nineteenth century, and reminds them that the soldier is the son of his time—and of his country. It points out that humane considerations, the sparing of human life and property, and other mitigations of extreme rigour can only come into play in so far as the nature and object of the war permit. But as the very aim of hostilities is to bring about universal destruction, it is obvious that "the nature and object of the war" will not allow of humane considerations at all. It emphasizes that the only limit imposed on the unrestricted use of violence, terror, and cunning is dictated by the combatants' own interest.

The German Manual is supposed to be the outcome of the rules established by the Hague Conventions of 1899. But

<sup>1</sup> Sir T. Barclay, *Nineteenth Century*, December, 1914.

<sup>2</sup> *Ibid.*

so far as the Manual is concerned, the latter might never have existed. It relies rather on German authorities than on international treaties and conventions, to which its own State was a voluntary party. It sets forth examples repeatedly—indeed, almost exclusively—from the Franco-German War of 1870–1, and neglects the better practices of more recent wars—as though the proceedings of the German invaders of 1870–1 are to constitute the true precedents of the law of the modern world! (We shall see presently the kind of conduct adopted by the Germans in this war, and now held up as a worthy model to admire and imitate.) The Manual disregards the provisions laid down in 1899 as to the distinction between combatants and non-combatants. With regard to the levy *en masse*, which it describes as national or popular war—we have already referred to the German accusations against Belgium of having organized a “people’s war”—it does not mention Article 2 of the Hague Regulations of 1899. It insists on a real military organization in the case of all who would defend themselves against an approaching invasion, and this in spite of the rules established by the States of the world. It authorizes the putting of prisoners to death, by way of reprisals. It disputes the necessity to give warning at any time in case of a contemplated bombardment, despite the requirements of Article 26 of the Hague Regulations—evidently the precedent of Bismarck refusing to give such notice in 1870 is considered by his faithful successors to be much more authoritative than the general consensus of opinion, and a written rule of international law sanctioned by the sovereign Powers of the world. It maintains that a commander has the right to refuse quarter and to destroy prisoners, notwithstanding the specific prohibition of Article 23. And so on with other denials, contradictions, and repudiations of many established rules and—what is even worse—downright indifference to many others. In effect, the German Manual, by its ambiguous generalities, its subtle insinuations, its arbitrary reservations, its deliberate disavowals of widely accepted principles, says to the

warriors of Germany: "Soldiers of the Fatherland! Your Government has, it is true, entered into treaties and conventions. The world has established certain usages and customs. But these treaties and conventions and usages are nought; they do not bind you when you make war. Your business is not with law; it is simply to crush the enemy by every means in your power, and as quickly and as effectively as possible. Your instructors say so—the rest of the world does not matter."

What is this doctrine of military necessity, that is deified by so many German writers? The entire law of war (*Kriegsrecht*), they say, is made up of two parts: first, the *Kriegsmanier*, the custom or usage of war, which imposes certain restrictions on the licence of belligerents; and secondly, the *Kriegsraison*, the necessity of war which sets aside all such restrictions when their observance would be detrimental to the military operations and render more difficult the attainment of the object for which the war was made.<sup>1</sup> The true implication in the maxim "*Kriegsraison geht vor Kriegsmanier*" (Necessity of war takes precedence of usage of war) is that in case of alleged imperative necessity, the laws of war lose their binding force altogether. Those who advance these views hold that this military necessity is like the principle of necessity in criminal law, which excuses a person who is compelled to adopt exceptional measures in a case of self-defence. But no criminal jurisprudence teaches (as we have shown in an earlier chapter) that any violent measure whatever may be taken in a case of self-defence. Moreover, it is essential to distinguish between such measures taken in the course of a conflict by the one who was the original aggressor, and those taken by the innocent attacked party. This important distinction is disregarded by those who compare military necessity with the necessity of self-defence in private life. To maintain this comparison they ought to show that the criminal law of civilized communities says, in effect: If

<sup>1</sup> Cf. the exposition of Dr. C. Lueder, in F. von Holtzendorff's *Handbuch des Völkerrechts* (Berlin, 1885-9), vol. iv. §§ 65, 66.



you, A, attack B with your fists, and find that B's pugilistic capacity is greater than yours, so that you are likely to get the worst of the encounter, then you, A, for reasons of self-defence, are entitled to draw a revolver concealed in your pocket and shoot B dead. Indeed, there are, necessarily, limitations imposed even on the measures of self-defence taken by an innocent person who is attacked by another. It is clear that the comparison will not hold. And clear it is, too, that this doctrine of "military necessity," applied without restriction in each case by the party interested, is directly contrary to the whole trend of human civilization, and is in conflict with the entire structure of international law. In such conflict all extravagant claims of military necessity must give way to the superior demands of law and order. The representatives of the States assembled at the Hague Conferences have distinctly agreed when military necessity may and when it may not apply. For their regulations discriminate between what is prohibited, what is permissible, and what is to be followed "as far as possible." Military necessity can have no operative force as against positive prohibitions. Moreover, Article 22, which stipulates that the right of belligerents to adopt means of injuring the enemy is not unlimited, is an emphatic and supremely authoritative repudiation of this far-fetched and arbitrary German doctrine of *Kriegsraison*.

In concluding this chapter, it will be of special interest here to recall the pronouncement of Von Moltke on this subject, and the luminous reply of Bluntschli, whose breadth of view and humanity do not appear to have been bequeathed to his professorial successors in Germany. The views, too, of the famous field-marshal, stern and uncompromising as they are, have been far transcended in rigour and callousness by those of his administrative and military successors. In 1880 the Institute of International Law produced a body of war rules in its *Manuel*. A copy was sent to Von Moltke, who gave his opinion of it, and of the endeavours to humanize war, in the following

terms: ". . . I fully appreciate the philanthropic effort to soften the evils which result from war. Perpetual peace is a dream, and it is not even a beautiful dream. War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed; courage and the abnegation of self, faithfulness to duty, and the spirit of sacrifice; the soldier gives his life. Without war the world would stagnate, and lose itself in materialism." He agrees that a gradual softening of manners ought to be reflected also in the mode of making war. "But I go further, and I think the softening of manners can alone bring about this result, which cannot be attained by a codification of the law of war. Every law presupposes an authority to superintend and direct its execution, and international Conventions are supported by no such authority. What neutral States would ever take up arms for the sole reason that, two Powers being at war, the 'laws of war' had been violated by one or both of the belligerents? For offences of that sort there is no earthly judge. Success can come only from the religious moral education of individuals, and from the feeling of honour and sense of justice of commanders who enforce the law and conform to it so far as the exceptional circumstances of war permit. . . . It is impossible for the soldier, who endures sufferings, hardships, fatigues, who meets danger, to take only 'in proportion to the resources of the country.' He must take whatever is needful for his existence. We cannot ask him for what is superhuman. The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable with that view to employ all methods save those which are absolutely objectionable. I can by no means profess agreement with the Declaration of St. Petersburg, when it asserts that 'the weakening of the military forces of the enemy' is the only lawful procedure in war. No, you must attack all the resources of the enemy's Government, its finances, its

<sup>1</sup> Von Moltke to Professor Bluntschli, dated Berlin, December 11, 1880. (Trans. by Prof. Holland, *Letters to The Times upon War and Neutrality* (London, 1909), pp. 24-9.)

railways, its stores, and even its prestige. . . ." He says that various requirements in the *Manuel* "would be open to criticism did not the intercalation of such words as 'if circumstances permit,' 'if possible,' 'if it can be done,' 'if necessary,' give them an elasticity but for which the bonds they impose must be broken by inexorable reality. I am of opinion that in war, where everything must be individual, the only articles which will prove efficacious are those which are addressed specifically to commanders. Such are the rules of the *Manuel* relating to the wounded, the sick, the surgeons, and medical appliances." He afterwards mentions also prisoners.

We have already examined these arguments and dogmas in discussing the views of writers like Clausewitz and Bernhardi, and we have endeavoured to show their untenability. However, let us see what was the nature of Bluntschli's reply. The eminent jurist first of all points out that the same facts appear in a different light and give a different impression, according as they are looked at from the military point of view or from the legal point of view. "For the man of arms," he continues, "the interest of the safety and success of the army will always take precedence of that of the inoffensive population, while the jurist, convinced that law is the safeguard of all and especially for the weak against the strong, will ever feel it a duty to secure for private individuals in districts occupied by an enemy the indispensable protection of law." He observes that since the institution of standing armies arose the customs of warfare have improved, and the waging of war has become a national affair. Hence laws of war, which bind all under common rules, have become more than ever important and essential. Different nations may well have different views about this matter or that; but all are capable of being united under one law. A principle accepted by the legal conscience of civilized peoples "exerts an authority over minds and manners which curbs sensual appetites and triumphs over barbarism." . . . Every State, even the most powerful, will gain sensibly in honour with God and man,

if it is found to be faithful and sincere in respect and obedience to the law of nations. . . . The error which has been handed down to us from antiquity, according to which all law is suspended during war, and everything is allowable against the enemy nation—this abominable error can but increase the unavoidable sufferings and evils of war without necessity, and without utility from the point of view of that energetic way of making war. . . . With reference to several rules being stated with the qualifications 'if possible,' 'according to circumstances,' we look on this as a safety-valve, intended to preserve the inflexible rule of law from giving way when men's minds are overheated in a struggle against all sorts of dangers, and so to insure the application of the rules in many other instances. Sad experience teaches us that in every war there are numerous violations of law which must unavoidably remain unpunished, but this will not cause the jurist to abandon the authoritative principle which has been violated. Quite the reverse. If, for instance, a flag of truce has been fired upon in contravention of the law of nations, the jurist will uphold and proclaim more strongly than ever the rule that a flag of truce is inviolable."

## CHAPTER IX

### METHODS OF WARFARE—(1) GERMAN CONDUCT IN THE WAR IN GENERAL

IN connection with the German proceedings in the present war, and the excuses advanced for their ruthless methods and outrageous conduct, it is particularly to be noted that what is not specifically prohibited by the Hague Conventions or other written provisions is not necessarily permitted. The fundamental elements, the guiding principles of the law of war, fortified as they have been by modern international Conventions and declarations, are by no means of recent growth. They have long possessed the force of law, and they have been repeatedly observed in earlier wars and in the wars of our own time. To allege that the non-ratification by a State of this or that treaty or of this or that article renders it inoperative—especially when the treaty or the article formulates rules that had already been accepted by civilized States—is a vain pretension. Even if the entire body of modern international written law were completely obliterated, the common law of nations would still remain—a common law based on enlightened practice and ineradicable conceptions of humanity and justice.

At the Hague Conference, 1907, when the question of unanchored automatic contact mines came under discussion and no definite agreement could be arrived at, one of the British delegates emphasized that, whether a Convention was or was not agreed to, humanitarian sentiment cannot be neglected; and "the legitimacy of a given act cannot be presumed for the mere reason that the Convention has not forbidden it." The German representative, the late

Baron Marschall von Bieberstein, accepted this view—though he did not fail to mention the claims of military necessity. But it is to be observed that the content of his remarks compels us to interpret military necessity as that necessity which is reasonable and legitimate, and not that which is unreasonable and illegitimate. In the course of his speech, he said: “. . . Military acts are not governed solely by principles of international law. There are other factors. Conscience, good sense, and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I proclaim it to the world, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be well not to issue rules the strict observance of which might be rendered impossible by the force of things. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view, even in exceptional circumstances. Otherwise the respect for law will be lessened and its authority undermined. . . . As to the sentiments of humanity and civilization, I cannot admit that there is any Government or country which is superior in these sentiments to that which I have the honour to represent.”

Moreover—and this is of much greater significance—the fact that a common law of nations exists in addition to the written law was recognized by the Hague Conferences of 1899 and 1907. In the preamble to the Convention as to war on land it was stated that though an agreement was not arrived at with regard to all possible circumstances that might arise in warfare, yet “it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders.” This explanatory

preamble goes on to say: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not covered by the Regulations adopted by them, populations and belligerents remain under the protection and governance of the principles of international law, as they result from the usages established among civilized nations, from the laws of humanity, and the dictates of the public conscience."

Let us now see whether the German armies have observed the customs established among civilized peoples, whether they have submitted to the laws of humanity and the dictates of the public conscience, and whether they have justified the high eulogy accorded to them by their representative at The Hague, Baron Marschall von Bieberstein.

Instead of following the dictates of the public conscience, the German armies have, indeed, by their proceedings in the present war revolted the conscience of mankind. They have bettered the examples of their predecessors of 1864, 1866, 1870-1, and the expeditionary force in China, 1900. The German commanders have made war as no other modern commander has made it. Napoleon, no doubt, sometimes adopted severe measures, for example, in Spain, and also in Lombardy in 1796, when his garrison in Pavia had been overwhelmed by the peasantry; it is true that he carried off works of art and did many other hard things. But he kept his armies under control; he did not resort to indiscriminate destruction; he did not commit outrages on women, children, priests, and other inoffensive inhabitants of the districts he invaded. Wholesale pillaging and burning of cities, wanton devastation of the enemy's territory, deliberate bombardment of cathedrals did not form part of his system of campaign. But the Prussians and their continental allies under Blücher, during their invasion of France in 1814 and 1815, committed numerous acts of rapine, lust, and murder.<sup>1</sup> When the French

<sup>1</sup> For a brief account of some of these acts, which is supported by references to documents, see Houssaye's works, "1814," pp. 44-54; "1815," vol. ii. pp. 342-3, pp. 490-7.

authorities made remonstrances to Blücher on account of the doings of his soldiers, he replied: "That is all they have done? They ought to have done much more!"<sup>1</sup> The Prussians declared, said Sismondi, that they would not leave France until she were as though the fire of heaven had passed over her.<sup>2</sup> On the other hand, French historians pay tribute to the efforts of Wellington to maintain military discipline among the troops under his command, and save the country from these horrors. Soon after the battle of Waterloo, Sir John Malcolm, a man experienced in wars and in public affairs, complimented Wellington, in a conversation with him in Paris, on the discipline and good conduct of the English troops. The Duke replied that he had done his utmost to bring this about, and added: "The Prussians behaved horribly, and had not only lost character, but their object; for more was destroyed than taken; and in such scenes of indiscriminate pillage and harshness those who deserved to suffer often escaped, and the benefit, when there was any, generally fell to them who deserved it least."<sup>3</sup>

Some twenty years after Waterloo, Heine in many brilliant writings warned his countrymen of the brutal instincts that lurked in their hearts. Did he utter a prophecy when he wrote: "Christianity—and this is its highest merit—has in some degree softened, but it could not destroy, that brutal German joy of battle. When once the talisman talisman, the Cross, breaks in two, the savagery of the old fighters, the senseless Berserker fury of which the Northern poets sing and say so much, will gush up anew. That talisman is decayed, and the day will come when it will piteously collapse. Then the old stone gods will rise from the silent ruins, and rub the dust of a thousand years from their eyes. Thor, with his giant's hammer, will at last spring up, and shatter to bits the Gothic cathedrals." The modern Germans have evidently

<sup>1</sup> Houssaye, "1815," vol. ii. p. 848.

<sup>2</sup> *Ibid.*, p. 490.

<sup>3</sup> Kaye, *Lives of Indian Officers*, vol. i. p. 198.



not benefited much from the inspiring doctrines of their greatest philosopher, Kant: "Treat humanity in thy own person and in the person of others always as an end and never as a means only."

Bluntschli, the distinguished jurist and professor of civil and international law at Munich and then at Heidelberg, declared that the excesses committed by the Germans in the Franco-German War would be classed by posterity with the atrocities of the Thirty Years War. Even German writers could not but condemn the conduct of their countrymen, and the cynical disregard of recognized laws and customs. Neutral correspondents denounced the numerous crimes and exorbitant exactions of the German armies, who were compared to the old scourges of humanity. The diplomatic circulars issued by France proved fruitless. Despite royal and military proclamations promising humane treatment, the invaders, whenever they met with resistance, especially unexpected resistance, or whenever their plans miscarried, had recourse to systematic incendiarism, slaughter, destruction, pillage. They considered self-defence a crime. So, because men dared to stand up in defence of their families and their homes, entire villages were often razed to the ground; inoffensive civilians were shot down. Prisoners were subjected to inhuman treatment. Many wounded were finished off. They were determined to paralyse the whole nation by methods of intimidation. Their sole object was ~~to crush~~ their opponents, and the nature of means adopted to attain this object was deemed to be immaterial. Dignitaries and officials were arrested on the smallest pretext and held as hostages, with the threat of death hanging over them if the captors should be molested. Arbitrary requisitions were made, and enormous indemnities and fines were imposed. They refused to recognize the francs-tireurs, who were lawfully constituted combatants; and when the aim of one of their sharp-shooters had proved effective, streets of houses were soaked in petrol and fired. Local inhabitants were compelled to give information as to the movements of

French troops, and after having been forced to do this they were sometimes put to death. Towns were shelled without any warning. Hospitals, ambulances, churches, museums, libraries were not spared. Treacherous ruses were resorted to. In a word, the German invaders of 1870 were bent on crushing France by any means whatever, no matter how incompatible they might be with fairness, justice, civilization.<sup>1</sup> A French historian, who is accustomed to weigh well his words, observes—with marked moderation—as to the system of terrorism: “Dans l'application du système de terreur qu'il faisait peser sur le vaincu, l'envahisseur n'a pas une fois cédé à la pitié: le sang-froid qu'il gardait dans l'exécution de ce qu'on appelle les lois de la guerre, montrait qu'il était implacable. . . . La crainte des châtimens qui atteignaient toute velléité de résistance, la conviction trop justifiée qu'une défense sérieuse était impossible . . . décourageaient la population. . . . Tout Allemand devint un personnage sacré pour le vaincu. . . . L'ennemi avait donc produit l'effet qu'il attendait de ses rigueurs: la terreur régnait dans le pays, et il pouvait en toute tranquillité employer ses forces à ses opérations qui devaient avoir quelque importance.”<sup>2</sup>

Nearly half a century later the Germans once more invaded the territory of their neighbours; and once more they showed themselves to be wreckers, vandals, slaughterers, reckless violators of established law and custom—of the law of God and man alike. (It is perhaps necessary to say here that we do not, of course, apply these terms to *all* the members of the German armies; but the acts of outrage and the cases of violation of international law

<sup>1</sup> For full details and references as to the misconduct of the German armies and their violations of international<sup>o</sup> law during the Franco-German War, see P. Gigout, *Les principales violations du droit des gens commises par les armées allemandes pendant la campagne de 1870-1* (Dijon, 1900); A. Brenet, *La France et l'Allemagne devant le droit international pendant les opérations militaires de la guerre de 1870-1* (Paris, 1902).

<sup>2</sup> E. Lavisse, *Essais sur l'Allemagne impériale. L'invasion dans le département de l'Aisne*, pp. 20, 21.

were so numerous—and, what is more, most of them were apparently sanctioned beforehand by their official manual of war law—that we feel justified in saying, for the sake of brevity, “the Germans” or “they” did so and so, instead of saying “many” or “some” of the Germans did this or that.) Bernhardt speaks of the “ennobling effects” of war; Treitschke speaks of its “elevating” results; and both of them contemplate with pride the virtues it engenders—not only constancy and heroism, but pity, mercy, and magnanimity. It is not our task here to describe in a graphic manner the conduct of the Germans in their invasion of Belgium and France, or to inquire whether they have manifested during their belligerent operations all these qualities claimed by the bellicose militarists who worship at the shrine of blood and fire. Our task is rather that of the judicial investigator, namely, to determine in what respects the Germans have broken the established law.

The Belgian Commission, and later the French Commission, appointed by their respective Governments to inquire into the conduct of the invaders, drew up a series of reports which have been published in the press. The evidence on which the conclusions were arrived at was so widespread, so circumstantial, and so constantly corroborated, that we cannot doubt their substantial truth, whatever allowance we may make in regard to minor details. The first Belgian report, which was submitted to the President of the United States by a special envoy despatched by the King of the Belgians, said: “Among the numerous accusations which were brought to the attention of the Commission by the public, only those facts have been retained which have been verified beyond doubt by testimony worthy of credence. These facts represent only a very small part of those which seem to have been committed.”<sup>1</sup> The third report of the Commission emphasized this point once more, and added: “If an international inquiry, like that which was conducted in the Balkans by the Carnegie Commission,

<sup>1</sup> *The Case of Belgium* (September, 1914), p. xii.

could be conducted in our country, we are convinced that it would establish the truth of our assertions."

The first report, then, referring to "the deplorable state of affairs prevailing in Belgium," stated that its neutrality was unjustly violated, and since the beginning of hostilities was "the theatre of the worst outrages on the part of the invading German army, in defiance of rules solemnized by international treaties, and customs consecrated by public right and the law of nations."<sup>1</sup> "In a war against a nation against which they have no grievance of any kind, the Germans resorted to proceedings which are not only inadmissible from the humanitarian standpoint, but are directly prohibited by the Hague Regulations."<sup>2</sup> Entire regions were ravaged, and abominable deeds of violence were perpetrated in the towns.<sup>3</sup> "Peaceful inhabitants were massacred, defenceless women and children were outraged, open and undefended towns were destroyed; historical and religious monuments were reduced to dust, and the famous library of the University of Louvain was given to the flames."<sup>4</sup>

The invaders' usual procedure in Belgium may be described as follows. As they advanced along the roads, they frequently shot inoffensive passers-by, especially cyclists, and even peasants labouring in the fields. In the places where they stopped they first requisitioned food and drink; then they began shooting wildly, sometimes from the interior of empty houses, declaring that the inhabitants had fired the shots. Immediately afterwards, firing scenes began, murder and pillage followed, neither sex nor age was respected. Even when they claimed to have discovered the one who committed an alleged offence against them, they did not content themselves with executing the offender summarily, but they took advantage of the occasion to decimate the population, loot the dwellings and set fire to them. After a first massacre of this kind, they frequently shut in the church of the town all the men they could lay their hands on, and ordered all the women to go back to their houses

<sup>1</sup> *The Case of Belgium* (September, 1914), p. v.

<sup>2</sup> *Ibid.*, p. xi.

<sup>3</sup> *Ibid.*, p. 82.

<sup>4</sup> *Ibid.*, p. vi.

and leave the doors open during the night.<sup>1</sup> The third report of the Belgian Commission adds that individual plunder was followed by exorbitant war levies impossible to satisfy, and by the seizure of hostages who were to be shot or kept in confinement until the excessive ransom were paid in full, "according to the well-known procedure of classic brigandage."<sup>2</sup>

Another example may be mentioned to show the frequently adopted method of making groundless allegations against the civilian population. The Belgian financial journal, the *Bien Public*, gives the following account of the circumstances preceding the destruction of Termonde: When the Germans entered Termonde, September 4, there was not a single Belgian soldier to be seen. Many houses had been hit by shells, and the greater part of the town's population fled. Scarcely had the German troops passed the gate of the town than they announced their intention of making terrible reprisals upon the inhabitants. "Civilians have been firing upon our men," said the commandant Von Förstner to a member of the Communal Administration, "we are going to burn the town." "Nobody has fired upon you" was the answer. "Besides, how can you know anything about it, since you have not yet entered the town?" "They fired from the top of the church." "Impossible; the church was closed." "Then it was from the bank that they fired." "But all the employees of the bank are gone." "Never mind, in any case our troops were fired on between Schellebelle and Termonde." "But how can you hold the inhabitants of Termonde responsible for what happened at Schellebelle?" "That is all the same to me" ("Das ist mir gleich"), answered the commandant, putting an end to the parley. Immediately afterwards the German Staff took up their quarters, and the remainder of the population fled terror-stricken. The following morning, the fell work began.<sup>3</sup>

<sup>1</sup> *The Case of Belgium* (September, 1914), p. 47.

<sup>2</sup> Cf. *The Times*, September 21, p. 6.

<sup>3</sup> *Ibid.*, September 22, p. 7.

To give an instance of the initial hostilities by the Germans in another region. On August 2, German troops under Major Preusker penetrated into Kalisz in Poland. The major at once ordered the mayor of the town to find quarters for his soldiers, and afterwards requisitioned the concert and artisans' halls, the public school, and the European Hotel. These were claimed as the rights of an invader. But the following morning he confiscated 27,000 roubles from the magistrate, and ordered the municipality to bring provisions for his men and their horses. Then he issued a proclamation to the inhabitants announcing that the town was annexed to Germany, and that only German war-law was binding. In the evening of August 3 the town was suddenly roused by several single shots. Soldiers rushed through the streets, and rifle fire was heard. No one knew what had happened; everybody waited in terror. In the morning it was found that four shots had been fired at a German patrol on the outskirts of the town. The German troops had lost their heads, and had shot at and wounded some of their own patrols whom they did not recognize in the dark. Fourteen townspeople were killed. Five men from the house where the shots had been fired were ordered by the major to be executed the same morning under the cemetery wall—without trial and without making sure of their guilt. "Some one told him that a shot had been fired from the windows of the magistrate's house, so he ordered his soldiers to bring before the building two hundred townspeople. These he forced to lie down in the dust under a broiling sun, face downwards. If any of them tried to change his position or to lift his head, he was kicked and knocked on the head by soldiers. This awful sin of 'expiation,' as Major Preusker called it, lasted for an hour and a half. To heighten the agony of the prostrated crowd, the Germans executed from their number" three innocent men. The mayor was also forced to lie on the stairs of the building. In the afternoon a ransom of 50,000 roubles was exacted from the mayor; and in the evening the town was

bombarded without warning. Next day the bombardment was resumed. "Patrols rushed through the streets, shooting occasionally at the windows." Many were killed. Hostages were taken from among the clergy and the leading citizens, and after having been shut up in a wind-mill they were sent to Posen. Two days later machine-guns commenced their work; many streets were damaged, and nearly all the municipal buildings were destroyed. Bombardment was once more begun, and lasted a whole day. "Then the soldiers pulled out from the cellars those who were still alive and, beating them, marched them with their hands up out of the town, telling them that every tenth man would be shot. They shut them in the frontier barracks, and after several hours let them go." This was a revenge for what the German major called the "Polish plot."<sup>1</sup>

Besides such acts as have just been mentioned—and they were not isolated cases, but were committed repeatedly—there are many other contraventions of international law that we shall consider in the following chapters. What was the excuse offered by the invaders for their barbarous conduct? We need not dwell on exceptional atrocities, which occur more or less in all wars, and which result from the battle-passions operating on the debased instincts of some men. Such deeds were described by the Kaiser in a telegram to President Wilson as "unavoidable." But the systematic acts of inordinate rigour and cruelty were authorized by the officers and sanctioned by the Government headquarters. In reply to Belgian charges relating to these, the German authorities issued an apologia, which said that as their armies were situated in a hostile country, such examples were necessary as would by their "frightfulness" secure them once for all from every molestation. The German commanders also said that the Belgian civil population infringed the rules of international law by making attacks on the troops. But the Belgian Government protested most vigorously against the allegations

<sup>1</sup> *The Times*, September 10, p. 7.

advanced, which were unsupported by trustworthy information.<sup>1</sup> The third report of the Judicial Commission denied emphatically that the inhabitants offered armed resistance to the Germans. It said that there might have been isolated instances provoked by the cruelty of the invaders; but these did not warrant the systematic shooting of civilians, the burning and pillaging of towns and villages. The Commissioners observed that if the Germans had confined themselves to executing the guilty persons, the Belgian people "could only have bowed before the rigour of military law." "But in no case could individual and absolutely exceptional acts of aggression justify the wholesale measures of repression which have been adopted against the persons and property of the inhabitants of towns and villages, . . . not only by way of alleged reprisals, but with a refinement of cruelty." There was no provocation whatever at Visé, Marsage, Louvain, Wavre, Termonde and other places, which were deliberately destroyed several days after they were occupied. There was no provocation on the line of march of the troops to justify the burning of isolated buildings and the shooting of fugitive inhabitants. "The Germans have asserted in their newspapers," said the Commissioners, "that the Belgian Government distributed to the civil population arms which were to be used against the invaders. They add that the Catholic clergy preached a sort of holy war, and incited their flock everywhere to massacre the Germans. Finally, they have declared, in order to justify the massacre of women, that women showed themselves as ferocious as the men, and went so far as to pour boiling oil from their windows upon the troops on the march. . . . All these allegations are so many falsehoods. Far from having distributed arms, the authorities everywhere on the approach of the enemy disarmed the inhabitants. The Burgomasters everywhere warned the townspeople against acts of violence, which would involve reprisals. The clergy have unceasingly preached calm to their flock. . . . As for

<sup>1</sup> *The Case of Belgium*, pp. 81, 82.



the women they were only anxious to escape the horrors of a ruthless war." The report goes on to say that the true motive for the atrocious conduct of the Germans was, on the one hand, to terrorize and demoralize the people in conformity with the inhuman theories of their military writers (some of these theories we have already considered<sup>1</sup>), and on the other, the desire for plunder. "A shot fired, no one knows where, or by whom, or against whom, by a drunken soldier, or an excited sentry, is enough to furnish a pretext for the sack of a whole city." Resistance offered by the armed forces was repeatedly laid to the account of the civil population; and the invaders invariably revenged themselves on the inoffensive inhabitants for the checks or even the disappointments suffered in the course of the campaign.<sup>2</sup> At Louvain—to take one of several similar examples—German soldiers had been seen on one occasion firing in the air from the courtyards of private houses, August 27, at about 10 o'clock at night, in the Rue de Malines; and this proceeding appears to have been deliberately planned to furnish an excuse for extreme measures.<sup>3</sup> In their Twelfth Report the Belgian Commissioners of Inquiry stated that during the hostilities in Belgium, the mere cry, "Man hat geschossen" ("shots have been fired"), raised by a German soldier was sufficient to cause places to be given up, without orders or delay, to assault and destruction, and the inhabitants to execution. The executioners generally refused to listen to any defence made by their victims.<sup>4</sup> Similarly, the French Committee of investigation reported that the Germans usually caused a shot to be fired by one of their own soldiers, and then used it as a pretext for venting their fury: "Dans quelques

<sup>1</sup> See *supra*, Chaps. II. and VIII.

<sup>2</sup> Third Report of the Belgian Commission, *The Times*, September 21, p. 6.

<sup>3</sup> *The Times*, September 28, according to a reliable statement made by a Belgian nobleman.

<sup>4</sup> Twelfth Report of the Belgian Commission, published in the press February 19, 1915.

villages, les Allemands, avant de mettre le feu, faisaient tirer un coup de fusil par un de leurs soldats, pour pouvoir prétendre ensuite que la population civile les avait attaqués, prétexte d'autant plus absurde qu'il ne restait presque, au moment de l'arrivée de l'ennemi, que des vieillards, des infirmes, ou des gens absolument dépourvus de tout moyen d'agression." <sup>1</sup>

All the horrors and atrocities perpetrated in Belgium were repeated in France. A French Judicial Commission (mentioned above) was appointed by a decree of September 23 to inquire into the nature of the Germans' conduct in France. It drew up a report which was issued in the *Journal officiel de la République Française*, January 8, 1915, and embodied the results of investigations carried out in the departments of Seine-et-Marne, Marne, Meuse, Meurthe-et-Moselle, Oise, Aisne. The evidence on which the report was based was scrupulously sifted; it was taken on oath, and was supported by numerous photographs illustrating the depositions made. The Commissioners observed that whenever there was a doubt they gave the benefit of it to the Germans, so that nothing might be admitted but what was based on irrefragable proof. The report states that the terrible sufferings inflicted on the people transcend anything that the imagination can conjure up. "On all sides one's eyes rest upon ruins; entire villages were destroyed by bombardment or by fire; towns formerly bustling with life are nothing but deserts filled with ruins. And when these desolate places where the invaders' torch has done its work are visited, there is the illusion that these are the vestiges of one of those cities of antiquity annihilated by the great cataclysms of nature. It may indeed be said that never has a war between civilized nations possessed the savage and ferocious character of that which is being made in our territory by an implacable adversary. Pillage, rape, incendiarism, and murder are the usual practice of our enemies. The facts which have daily

<sup>1</sup> *Journal officiel de la République*, January 8, 1915, p. 120. A second Report was published March 10, which is referred to elsewhere.

been revealed to us, besides constituting downright crimes against common law, punishable by the codes of every country with the severest and most ignominious penalties, show an astounding retrogression of German mentality since 1870." Outrages on women and girls were of unparalleled frequency. A great number of cases were investigated; though in a far greater number the victims of this odious conduct refused, through shame, to give evidence. Every refinement of cruelty and bestiality was practised by the German soldiers. The officers could have intervened on several occasions, but they acquiesced in their men's conduct. Most of the terrible enormities committed were part of their regular and organized procedure. Horrible scenes of carnage and destruction were enacted at Lunéville, Gerbéviller, Nomeny, Senlis, and many other places; and officers themselves not infrequently took part. The invaders' incendiary passion was directed unceasingly against churches, historic and artistic monuments. To carry out their work thoroughly they were provided with a complete outfit—torches, grenades, fuses, petrol pumps, combustible substances. Villagers were arbitrarily arrested and marched off to Germany; those who by their age or feebleness fell by the roadside were bayoneted or kicked to death. In many cases women and children were used as a screen to protect the German troops during the fighting or bombardment. Whilst houses were in flames, for example, at Gerbéviller, the inmates were taken out in the field and executed, or shot in front of their crumbling dwellings. Inhabitants, including aged women, who opened their doors were in several instances shot dead. The German soldiers entered the house of one family, took away the thirty-six-year-old son, who was wearing a Red Cross badge, tied his hands behind his back, shot him, then brought his old parents to witness the sight; as the body still moved, it was soaked in petrol and set alight in their presence. In another house a woman was murdered, and her stomach was ripped open. Similar ghastly deeds were committed at Lunéville. Pillaging was everywhere conducted in a

wholesale and organized manner. When there was no time to carry away the contents of dwellings, they were then and there destroyed. In many houses occupied by superior German officers, desks, safes, and jewel-cases were forced open, wine-cellars were emptied, and the rooms were rendered unfit for habitation. Silver plate, jewellery, pictures, furniture, objets d'art, linen, bicycles, women's dresses, sewing-machines, and even children's toys were seized, placed on wagons, and despatched to Germany. The Germans fired on the Red Cross and on those engaged in its service, and shot wounded as they lay on the battle-fields. Their excuse for all these unspeakable enormities was the alleged attack on them by civilians; but it was established beyond doubt that this allegation was a lie deliberately concocted to cover their homicidal fury, their eagerness for destruction, pillage, and robbery. Whenever an appeal was made to an officer to intervene on behalf of life or property, the answer invariably given was "War is war."

In France, as in Belgium, methods of intimidation were everywhere adopted. For example, not only was Reims threatened with the loss of its cathedral, but the German general informed the local authorities that if "disorder" occurred, the town would be "wholly or partly burnt."

Again, the German commander having discovered that the road from Sissonne to Montaigny had been covered with broken glass in order to stop the progress of the German armed motors—a perfectly legitimate means of self-defence against an invading force—regarded this proceeding as a crime, and accordingly imposed on the commune of Sissonne a fine of £20,000, in default of which both the town and the beautiful Château de Marchais, an archæological treasure, were to be "demolished and burnt."

The head of the Press Bureau in Paris said already at the end of August 1915<sup>1</sup> that it was established beyond doubt that the Germans had committed inconceivable brutalities in French villages, with a view to demoralizing the inhabitants and sowing terror, and he emphasized that it was one

<sup>1</sup> *The Times*, August 29, p. 7.

of their acknowledged methods of making war. "The new bureau," he continued, "would insist less on German atrocities, not because they did not exist . . . but because it was impolitic in the wider interests of the war to frighten the inhabitants of districts invaded by German troops. Stories already published of German brutalities have unnerved the civilian population to the point of hampering the armies on the march by their panic and their encumbering of the roads."

Another excuse offered by the Germans for their unrestrained violence has a much more fundamental bearing than their groundless allegations against the civilian population. According to statements in the leading German papers, for example the *Cologne Gazette*, it is contended that the prohibitions imposed on belligerent conduct by the Hague Regulations are not binding, inasmuch as every Convention contains an article to the effect that "its provisions are applicable only between the Contracting Powers, and only if all the belligerents are parties to the Convention"; whereas in the present war three of the belligerents, Serbia, Montenegro, and Turkey, though they have signed these Conventions, have not ratified them. This argument, whatever technical points may be adduced in its favour, is (as has been already shown in earlier chapters) untenable. Had these Conventions introduced only novel details of minor importance, or even serious innovations implying a departure from established rules and customs, we might possibly have acquiesced if such arguments were advanced. Even then they might well be impugned on the ground that purely technical defences tolerated in private jurisprudence can scarcely be admitted in international relationships, when they are subversive of justice and right. However this may be, when we recollect that nearly the whole of these Conventions merely enshrine in a more systematized form rules and customs of warfare that possessed binding force long before the Hague Conferences were held, we must unhesitatingly repudiate the argument of the German apologists as a mean and invalid excuse for covering illegitimate conduct.

## CHAPTER X

### METHODS OF WARFARE—(2) BOMBARDMENT—DESTRUCTION AND DEVASTATION

IN the earlier practices of warfare belligerents permitted themselves to employ very rigorous, sometimes unscrupulous, methods and proceedings against their adversaries; they paid little heed to the amount and kind of suffering they inflicted both on the armed forces and on the civil population. The civilized world has now outgrown cruelty and barbarism of this kind, which can never be reintroduced in self-respecting communities. With the establishment of standing armies and military discipline, with the sharper distinction between armed forces and civilians, and the fundamental conception of war being primarily, if not exclusively, an affair between States, or between Governments, rather than between all the individual subjects of one country and those of the other, it has come to be now a universally recognized principle of war that civil inhabitants, preserving their inoffensive character, are not to be attacked deliberately. In 1868 the Declaration of St. Petersburg laid down that the progress of civilization should have the effect of alleviating as much as possible the calamities of war, and that the only legitimate object which States should endeavour to accomplish during war is to weaken the military power of the enemy. This principle, it may be said, governs the law of bombardment.

For our present purpose there is no need to enter into historical discussions and indicate the rules and practices adopted in previous wars. It is now sufficient to point to existing laws, and, with these before us,

to see how far they have been observed by the German armies.

The Hague Regulations of 1907 declare that it is forbidden to bombard or attack by any means whatever (including projectiles from balloons and airships) such towns, villages, dwellings and other buildings as are undefended.<sup>1</sup> It is to be noted here that the article does not speak of "unfortified" places, it simply says "undefended." Hence a place that is unfortified, but in respect of which any measures of military defence have been adopted, may be legitimately bombarded. It would seem also that a place though not actually defended but merely occupied by the hostile forces, is likewise liable to be shelled. It is, then, permissible to destroy military stores, factories, and all establishments used for military purposes. But in no case is any town or village to be bombarded merely with a view to exacting a ransom from it.

Next, before the commander proceeds to bombard a place he is bound to do everything in his power to warn the authorities, except in the case of a surprise assault.<sup>2</sup> This requirement does not impose the obligation to give previous notice in all cases, seeing that it is qualified by such an expression as "should do all in his power." However, we may say that if a commander peremptorily commences the bombardment of any locality, and so gives no opportunity to the private inhabitants to withdraw from legitimate objects of attack and to secure a place of safety for themselves and their property, the burden of subsequently proving that his conduct was lawful will lie on him.

The following article lays down that in sieges and bombardments everything must be done by the attacking commander to spare buildings that are dedicated to religious worship, art, science, charity, and historic monuments, hospitals, and other places where the sick and wounded are collected, provided they are not being used at the time for any military purposes. The besieged must indicate the presence of such buildings or places by means of distinctive and visible signs which shall previously be notified to the

<sup>1</sup> Article 25.

<sup>2</sup> Article 26.

assailants.<sup>1</sup> We may reasonably infer from this provision that if any of those protected buildings are destroyed or damaged, or if civilians are killed or injured in the efforts to strike defensive works or military establishments, the assailants will not be chargeable with unlawful conduct if they did not aim intentionally at such buildings or civilians, and did not shoot at random without caring what was struck. Whether such acts are deliberate or unavoidable must be gathered, in the absence of direct evidence, from the general proceedings of the attacking enemy, from his known professions, and from his previous conduct in the same war or in preceding wars.

Further, Article 28<sup>2</sup> says that the giving up to pillage of a town or place, even when taken by assault, is forbidden.

So much for bombardment. In connection with this we must recall another article of the Hague Regulations (1907), which says that it is particularly forbidden to destroy or seize enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.<sup>3</sup> Thus, we have a confirmation of Article 28 above, together with a further prohibition. It is clear, then, that indiscriminate destruction of any property whatever, and devastation which is not directly necessary for military purposes, are illegal. Property that obviously interferes with the legitimate operations of a conflict may be destroyed. But if there is no clear connection between this destruction and the overcoming of the enemy's forces, then it is unjustifiable. To destroy for the mere purpose of damaging the enemy Government's pocket is unlawful. Even where devastation is found absolutely imperative, the best possible provision should be made for the dispossessed inhabitants, for example, in concentration or internment camps; but only

<sup>1</sup> Article 27.

<sup>2</sup> Cf. Article 18 of the Declaration of Brussels; Article 47 of the present Regulations, and Article 7 of the Ninth Convention of the Hague Conference of 1907—all these emphasize that pillage is unlawful.

<sup>3</sup> Article 28 (g).



the most extreme and the most urgent circumstances will, perhaps, excuse such proceedings.

Finally, we may mention that in reference to military occupation the Hague Regulations lay down that family honour, the lives of individuals, and private property, as also freedom of worship, must be respected. Private property may not be confiscated.<sup>1</sup> Pillage is again forbidden.<sup>2</sup> The property of communities or municipalities ("communes"), institutions devoted to religious worship, charity, education, art or science, even when belonging to the State, must be respected as private property; all seizure, destruction, or intentional injury of such institutions, of historic monuments, or of works of art and science, are forbidden and should be prosecuted.<sup>3</sup>

Let us now see whether these simple and definite rules, laid down and agreed to by the States of the world, were observed by the Germans in the present war. We shall deal first with their bombardment and treatment of towns and villages; then some observations on naval bombardment and aircraft bombs will complete the chapter.

Open and undefended places were bombarded. Towns like Malines, Alost, and Termonde were shelled when no armed force was near them, when there were no forts and strongholds, military depots or stores to be aimed at, and there were no strategic interests whatever to warrant such proceedings. Numerous villages, like Bourg-Léopold and Heyst-op-den-Berg, were similarly treated where there was not even a semblance of armed defence. Buildings devoted to religion, to art, science, charity, and historic monuments and even hospitals, were not spared. In the case of the bombardment of Malines, Termonde, Reims, their cathedrals were deliberately aimed at. During the shelling of Malines (at the end of August) the city was actually deserted. Practically the entire population, following in the wake of the Belgian army, had taken refuge three days before in the entrenched camp in the neighbourhood of Antwerp. About every four minutes a German battery

<sup>1</sup> Article 46.

<sup>2</sup> Article 47.

<sup>3</sup> Article 56.

fired a shell in the direction of the Cathedral of St. Rombault. The buildings that were damaged were all situated near the cathedral, and the church itself, a notable edifice, was struck by numerous bombs. This bombardment was not justified by any military reasons ; and " such a deed of vandalism," says the First Belgian Report, " can only be explained as a desire for vengeance, or as a desire to create a panic and to terrorize the inhabitants." <sup>1</sup> Again, at Ypres, the Cloth Hall, " an incomparable artistic monument," was intentionally demolished.<sup>2</sup> At Louvain, the university and the priceless library were wilfully made a target by the assailants. At Reims, the old Archevêché Museum was battered. At Chalons, shells were fired at the hospital.

These deliberate attacks on protected buildings are only a few cases chosen at random from a large number. Other conspicuous instances of prohibited acts are seen in the following brief account of the general treatment of towns and villages. For the sake of simplicity, a chronological arrangement is, as far as possible, adopted.

In the night of August 10, 1914, German cavalry reached Velm in Belgium whilst the inhabitants were asleep. Without any provocation they fired on a house, broke into it, destroyed the furniture, took possession of all the money they found ; then they proceeded to burn the barns, corn stacks, farm implements, oxen, and the contents of a farmyard. They also plundered and burned down the house of a railway watchman.<sup>3</sup>

On August 19 as the German troops were advancing towards Aerschot, most of the inhabitants fled terror-stricken from the neighbouring districts. The invaders during their passage set fire to farms, houses, furniture. At Hersselt, a village near Aerschot, thirty-two houses were set on fire.<sup>4</sup>

On the same day Aerschot, a town of 8,000 inhabitants,

<sup>1</sup> *The Case of Belgium*, pp. 23, 24.

<sup>2</sup> Cf. the Seventh Report of the Belgian Commission, *The Times*, January 1, 1915, p. 4. •

<sup>3</sup> *The Case of Belgium*, p. 38.

<sup>4</sup> *Ibid.*, p. 35.

was entered. No Belgian forces were there. Soon afterwards, one of the German superior officers—according to one account, a general—was shot dead. The Germans attributed this act to the young son of the Burgomaster of the town. The latter's wife, however, made the following statement: "About 4 o'clock in the afternoon my husband was distributing some cigars to the soldiers, standing outside our door. I was with him. Seeing that the general and his aide-de-camp were watching us from the balcony, I advised him to come in. At this moment, looking towards the Grande Place, where more than 2,000 soldiers were encamped, I saw distinctly two puffs of smoke. Firing followed. The Germans were firing towards the houses and breaking into them. My husband, my children, the servants, and myself had just time to rush to the stairs leading to the cellars. The Germans were even firing in the halls of the houses. After a few minutes of great anxiety, one of the general's aides-de-camp came down, saying: 'The general is dead; where is the Burgomaster?' My husband said to me, 'This will be serious for me.' As he was stepping forward, I said to the aide-de-camp, 'You may see, sir, that my husband did not fire.' 'Never mind,' he answered, 'he is responsible.' My husband was taken away. My son, who was at my side, led us to another cellar. The same aide-de-camp then came back and took him away from me, kicking him along. The poor boy could scarcely walk. During the morning, while entering the town, the Germans had fired into the windows of the houses; a bullet had entered the room where my son was and wounded him in the leg. After they had taken my son and my husband from me, the Germans led me through the whole house, levelling their revolvers at my head. I was made to look at the dead body of their general; then they threw me, with my daughter, out of the house, without a coat or anything on. They left us in the Grande Place. We were surrounded by a line of soldiers and had to see our dear town burn before our eyes. There, in the sinister light of the fire, I saw for the last time, towards 1 o'clock

in the morning, father and son bound together. Followed by my brother-in-law, they were being brought to their death." A price was afterwards set on the widow's head, probably in order to get rid of a troublesome witness.<sup>1</sup>

The town of Aerschot was for three days given up to wholesale incendiarism, devastation, and pillage. The church was almost entirely destroyed. The interior was turned into a litter of wreckage; the collection-boxes were forced open. The archives of the town were carried off. Many civilians were killed; and before the church was destroyed, a great number of the inhabitants had been shut up in it for several nights. What was left of some of the houses visited is thus described: "Everywhere the furniture is overturned, torn, and soiled in the vilest manner; the wallpaper hangs in rags from the walls, the doors and cellars are broken open, all locks have been forced open, all cupboards and drawers emptied, linen and the most incongruous objects scattered on the floors, together with an incredible number of German bottles. In the houses of the well-to-do the pictures have been slashed, the works of art broken, . . . the total ruin which has overtaken this laborious and peaceful population is much more due to an organized pillage than to fire, which spared certain quarters of the town. . . . By the invaders' own admission Aerschot's destruction has been the result of a deliberate decision. In the eyes of the German commander, the massacre of an indeterminate number of innocent people, the transportation of several hundred others, the savage treatment inflicted on old men, women, and children, the ruin of so many families, the burning and the sacking of a town of 8,000 souls, constitute justifiable reprisals for the act of a single individual."<sup>2</sup>

At Rotselaer, some fifteen houses were put in flames, and everything that could be got hold of was plundered. "A German officer, addressing an inhabitant whose house was

<sup>1</sup> Fifth Report of the Belgian Commission, dated October 9.

<sup>2</sup> Fourth Report of the Belgian Commission, dated Antwerp, September 17, 1914. Cf. *The Case of Belgium*, pp. 85, 86.

afire, wanted to make him declare, at the point of a pistol, that the fire had been started by the Belgians. When this inhabitant protested, claiming that the Belgians had left the town the previous evening, this officer declared that if the Germans had set fire to the town it was probably due to the fact that the civilians had fired at them—an accusation denied by all the witnesses.”<sup>1</sup>

On August 18 and 19 some dreadful acts were committed at Schaffen, near Diest, and in the adjoining villages, Lummen and Molenstede. The whole district was devastated. All along the road from Diest to Beeringen the work of destruction went on. At Diest everything accessible was set on fire—farms, houses, furniture. The village of Schaffen was similarly treated.<sup>2</sup>

Rethy, a village near Turnhout, was laid waste, August 22.<sup>3</sup>

In the night of August 21 a German armoured motor-car entered Dinant by the Rue Saint-Jacques, and without any provocation commenced firing on the houses in this street. Inhabitants were killed and dwellings fired. On the following day the work of slaughter and demolition was renewed with greater vigour. Machine guns were turned on the people. The town was methodically destroyed, bombs having been employed for the purpose.<sup>4</sup>

On August 24–25, the Belgian troops, making a sortie from their entrenched camp near Antwerp, attacked the German army outside Malines, and drove it off as far as Louvain and Vilvorde. The villages that had been occupied by the Germans were laid waste by them on their retirement, and the male inhabitants were taken with them.<sup>5</sup> The Belgian Commissioners emphasized the deliberate system of devastation and destruction: “A large number of places situated in the triangle between Vilvorde, Malines, and Louvain—one of the most populous and prosperous regions in Belgium—have been given over to plunder, partially or entirely destroyed by fire, their population

<sup>1</sup> *The Case of Belgium*, p. 88.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> See the Belgian paper, *Le Matin*, September 26, 1914.

<sup>5</sup> *The Case of Belgium*, p. 41.

dispersed. . . . This was notably the case in the communes or hamlets of Sempst, Weerde, Elewyt, Holstade, Westpelaer, Wilsele, Bueken, Eppegheem, Wackerzeele (Rotselaer), Werchter, Thildonck, Boortmeerbeek, Houthem, Tremeloo. In this last village only the church and the presbytery remained standing.”<sup>1</sup>

Some German troops had already entered Louvain on August 19. Many houses of inhabitants who fled were broken into, and pillage and orgies ensued.<sup>2</sup> The German army repulsed by the Belgians a few days later (as mentioned in the preceding paragraph) entered Louvain. Two German regiments had probably fired on each other. Accordingly, on the pretext that inhabitants had done this—an allegation disproved by all the witnesses examined, and all the more groundless as the population had before been obliged to give up their arms to the local authorities—the German soldiers first bombarded the city, and then deliberately set fire to it. The report emphasizes that “not one of the witnesses has seen the body of a single civilian at the place where the affray happened,”<sup>3</sup> and states that the real cause of the German conduct was the death of a Uhlan at the hands of a Belgian soldier of the gendarmerie corps<sup>4</sup>—for which insatiable retribution on the civilian population was exacted. Houses that had not taken fire were entered by the German soldiers, who made use of fire grenades. The greater part of the city, particularly the “Ville Haute” containing the modern houses, the Cathedral of St. Peter, the university buildings, the treasured library with its priceless collections and manuscripts, most of the scientific institutions and the theatre—all these were consumed by flames. Large numbers of civilians were burned to death. The suburbs of Louvain were subjected to similar treatment. The whole region between Louvain and Malines, and most of the suburbs of Louvain, were demolished.<sup>5</sup> “The country of Eastern Brabant,” said the

<sup>1</sup> Third Report of the Belgian Commission.

<sup>2</sup> *The Case of Belgium*, p. 40.

<sup>4</sup> *Ibid.*, p. 45.

<sup>3</sup> *Ibid.*, p. 48.

<sup>5</sup> *Ibid.*, pp. 44, 45.

fugitive treasurer of the city, "so rich, so fertile, and so beautiful, is to-day a deserted charnel-house."<sup>1</sup> Another eyewitness says of Louvain: "The town resembles an old city in ruins, in the midst of which drunken soldiers are circulating, carrying around bottles of wine and liquor; the officers themselves being installed in arm-chairs, sitting around tables, and drinking like their own men."<sup>2</sup>

The destruction of Louvain was an act of downright barbarism, an outrage to humanity and an insult to the laws of war. Even if a few Belgian soldiers had fired on the troops in occupation, this could never justify the razing of a peaceable town and the violent expulsion of 50,000 inhabitants. Collective penalties, unrestrained reprisals, wholesale devastation, are forbidden by international law. The destruction of Magdeburg by Tilly in the Thirty Years War (1631) was described as the most terrible visitation of God since the destruction of Jerusalem. But the treatment of Louvain was a far greater crime, as it was a considerably larger town, entirely undefended, and was not taken by storm but demolished systematically and on principle. Some of the glorious possessions of Louvain had dated from the early part of the fifteenth century. Justus Lipsius, the great classical scholar of the city, recorded that it was the object of universal admiration in the sixteenth century. "O felix Louvanium," he proudly and lovingly apostrophizes it, "urbs urbium, lumen decusque Belgicæ et caput quondam regni!"

The Germans entered Namur, August 23, and there soon followed an organized destruction of buildings by fire. The invaders, as usual, sought to justify their conduct by alleging that shots had been fired on the troops by the residents. But the Belgian Commissioners observed: "Every circumstance demonstrates the absurdity of this statement. The juxtaposition of observed facts and the sequence of concordant evidence lead to the conclusion that the incidents at Namur were deliberately prepared, and merely formed part of the general system of terrorism

<sup>1</sup> *The Times*, September 8, p. 11.      <sup>2</sup> *The Case of Belgium*, p. 45.

which was habitually practised by the German army in Belgium." The town was pillaged, and in some cases the plunder was sent off to Germany. Several outrages were committed on women. Many civilians perished in their burning houses, others were shot in the streets or in their own dwellings. In the diocese of Namur twenty-six priests and members of religious orders were shot. It was stated that in the province of Namur, which had a population of 364,000, some 2,000 unoffending inhabitants—men, women, and children—were massacred.<sup>1</sup>

On August 28 German troops arrived at Péronne, shouting furiously and firing shots at windows to terrorize the inhabitants. At the town hall the authorities were summoned, and as none appeared the sub-prefecture building and the surrounding houses were soaked with petrol and then lighted by means of grenades.<sup>2</sup>

Termonde was attacked and bombarded on September 4. The same evening it was entered, and the work of plunder began forthwith. Hostages were taken. The town had been quiet, and had offered no resistance whatever. But the following day methodical demolition began. Ordered by their officers, German troops went through the streets systematically, firing each building separately. Most of the doors had been left open; those that were closed were forced open; some combustible liquid was squirted inside and lighted. The result was utter desolation, not through accidental fires or military bombardment, but brought about by a deliberate house-to-house visitation. Out of some 14,000 houses in a defenceless surrendered town, scarcely a hundred remained intact.<sup>3</sup> On September 16 the town was again bombarded; and on this occasion the few inhabitants who had remained in the town were notified beforehand. Several large factories were then burnt down.<sup>4</sup>

<sup>1</sup> Eleventh Report of the Belgian Commission (published in the press February 18, 1915).

<sup>2</sup> *The Times*, September 28, p. 8.

<sup>3</sup> *Ibid.*, September 15, p. 12.

<sup>4</sup> *Ibid.*, September 18, p. 7.



Three days later they sprayed petrol over the walls and floors of the Hôtel de Ville (one of three notable buildings that had before been spared), and set fire to it.<sup>1</sup>

Mr. J. H. Whitehouse, M.P., who visited Belgium in order to see the extent of the ravages committed there, reported that Termonde was entirely destroyed in a systematic manner. "In each house a separate bomb had been placed, which had blown up the interior and had set fire to the contents. All that remained in every case were portions of the outer walls still constantly falling. Only two or three houses bore a German command in chalk that they were not to be burnt; these remained standing, but deserted amidst the ruins on either side. Where a destroyed house had obviously contained articles of value, looting had taken place. In a jeweller's shop a safe had obviously been rifled." Numerous appliances were used by the Germans to aid them in their rapid work of destruction. Hand-bombs of different kinds and sizes were used. The troops were also supplied with small discs made of compressed benzine, which were used in conjunction with the bombs.<sup>2</sup>

About the middle of September Romagny was attacked. It was then occupied by Alsatian villagers and German subjects, who took refuge in their cellars. No French soldiers were there at all. Yet the Germans bombarded it heavily from a distance of about 500 yards, and many houses were wrecked. The church also was aimed at. "When the investing force had battered their unresisting prey to their hearts' content from a distance they entered it and set fire by hand to 11 of its 42 houses, including a farm in which 28 cattle were burned to death."<sup>3</sup>

One of the most heinous crimes in the present war was the bombardment of Reims Cathedral (September 20). Some time before this deed was perpetrated the *Frankfurter Zeitung* wrote (September 8): "Let us respect the French cathedrals, that of Reims in particular, which is

<sup>1</sup> *The Times*, September 22, p. 7.      <sup>2</sup> *Ibid.*, October 2, p. 11.

<sup>3</sup> *Ibid.*, September 21, p. 10.

one of the finest in the world. Since the Middle Ages it has been specially dear to the Germans, as Bamberg drew from it inspiration for many of his figures. . . . We regard these grand churches with veneration. We shall respect them as our forefathers did in 1870." The Germans both in 1870 and in 1814 had spared the sacred edifice, which for seven centuries was one of the most famous and beautiful cathedrals in Christendom. Its historic fame, its sanctity, its sublime presence, if not the definite prohibitions of international law, should have secured it reverence and protection. The bombardment did not even serve military interests. The cathedral was fired upon intentionally and wantonly, for it is a clearly visible landmark for miles round. It is reported that a well-known hotel close by which was kept by a German was not touched. The French Minister for Foreign Affairs forwarded to the neutral Powers a protest to the following effect: "Without being able to plead even military exigencies, and solely for the pleasure of destruction, the German troops have subjected Reims Cathedral to a systematic and furious bombardment. At the present moment [that is, September 20] the famous basilica is no more than a heap of ruins. The Government of the Republic finds it necessary to denounce to universal indignation this revolting act of vandalism which, by handing over to the flames a sanctuary of our history, has robbed humanity of an incomparable portion of its artistic patrimony." A telegram from Berlin, September 21, stated: "Reims lies in the area of the battle and the French compelled us to reply to their fire. We regret that the city has been damaged. Orders have been issued to spare the cathedral as much as possible." (This intimation was made after the cathedral was already destroyed.) Moreover, the Red Cross flag hung from its pinnacle. German wounded prisoners were at the time sheltered within its walls, the only other occupants being its clergy, the sacristan, and some Sisters of Mercy. The French, risking\* their own lives, extricated

\* Dated Bordeaux, September 21; *The Times*, September 22, p. 9.

nearly all the German wounded from the burning building—an act described by a French writer as their “revenge” for the German conduct.

As an excuse for bombarding the cathedral, the Germans contended, firstly, that French guns had been posted behind or near it, so that it was impossible to avoid hitting it; and, secondly, that on one of the towers a post of observation had been installed, which it was necessary to destroy.<sup>1</sup> But the bombardment was renewed later, on the pretext that in the towers, which were then half-demolished, there were observers using flash-lights. The first contention has been characterized as untenable and ridiculous; and from every point of view it appears that the Germans deliberately aimed at the cathedral in an insane spirit of vindictiveness, because the French had offered a successful resistance. In reply to the later allegation, an official Note was issued from Paris, to this effect: “The whole plain of Reims can be watched equally well and less dangerously from the neighbouring heights. Finally, if we had had observers in the towers, it would have been enough to have supplied them with a telephone, which would have enabled them to give information without arousing the attention of the enemy.”<sup>2</sup> It may be added that even had the cathedral towers been put to some trifling military use, any rationally minded commander would have sent in a *pourparler* before ordering big guns to be fired on them.

Douai, having been attacked by the Germans, September 21, and taken by them October 1, was dealt with in their accustomed manner. The inhabitants were treated with extreme severity; and on the pretext that some of them had fired on the troops from their dwellings, forty houses were burnt down as a “punishment.” “The Germans mounted on ladders to the roofs, set fire to the lofts, then storey by storey made their task complete. One prominent citizen, alarmed at the smoke which was filling his house, stepped out of his front door to see the incendiaries. He uttered a protest, and was instantly shot dead.”

<sup>1</sup> *The Times*, September 25, p. 6.

<sup>2</sup> *Ibid.*, October 21, p. 7.

All the neighbouring villages were also destroyed ; nothing but a heap of blackened ruins remained of them.<sup>1</sup>

Numerous villages and townships in France were treated like those of Belgium. Thus scenes of conflagration and devastation were witnessed at Chauconin, Congis, Penchard, Barcy, Douy-la-Ramée, Courtacon, Lépine, Marfaux, Le Gault-la-Forêt, Auve, Etrepy, Huiron, Sermaize-les-Bains, Bignicourt-sur-Saulx, and scores—literally—of other places.<sup>2</sup>

The bombardment of Belgrade by the Austrians was an act of wanton destruction, as the city was undefended, and no necessarily military purpose was involved. The Serbian batteries were located at some distance from the town. The university was wrecked ; and of 700 other buildings struck 60 were the property of the State. The assailants made frequent use of shrapnel ; and no respect was shown for the quarters of private citizens, among whom there were many killed and wounded, whilst the losses among the military forces were insignificant.<sup>3</sup>

Next we have to refer to the question of bombardment by naval forces. The Ninth Convention of the Hague Conference, 1907, laid down a number of rules which are analogous to those mentioned above respecting bombardment in land warfare. As in the case of the latter, undefended ports, towns, villages, dwellings or other buildings must not be attacked ;<sup>4</sup> and, as before, even when bombardment is permissible, all necessary measures should be taken by the commander to spare churches, hospitals, institutions of art or science, historic monuments, provided they are not used at the time for military purposes.<sup>5</sup> The legitimate objects of assault are military and naval works and establishments, depôts of arms or war material, workshops and plant that might be utilized

<sup>1</sup> *The Times*, October 8, p. 7.

<sup>2</sup> Report of the French Commission, *Journal Officiel*, January 8, 1916, pp. 118-19.

<sup>3</sup> *The Times*, October 10, p. 7.

<sup>4</sup> Article 1.

<sup>5</sup> Article 5.

by the army or navy, and men-of-war in harbour; but the local authorities must first be called upon to destroy these themselves within a given time, unless military reasons demand immediate action. If every care has been exercised to cause as little harm to the town as possible, the commander will not be held responsible for unavoidable damage.<sup>1</sup> Further, as in land warfare, the commander of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities, unless military exigencies do not permit it.<sup>2</sup> The rule as to previous notification was laid down, so that measures might be taken to protect the civil population and give defenceless women and children an opportunity to withdraw to a place of safety.

Having regard to these regulations, we have to record a striking contravention of international law in the case of the bombardment of certain north-east coast towns by the German men-of-war. On December 16 the Hartlepoons, and the undefended towns of Scarborough and Whitby, were bombarded. The loss of life among the civil population was considerable, and many were wounded. The damage done to innocent property was heavy. It appears that in each of these seaside resorts attempts were made to destroy such objects as coastguard stations; but considering the proximity of the assailants to the shore, it is obvious that the firing was on the whole of a reckless and indiscriminate character. Churches, private houses and shops, old men, women, and children, though at a considerable distance from the coastguard stations—the ostensible targets—were reached by the shells that were hurled in all directions without previous notification. The commander could have taken, had he wished to do so, some of the precautions required by the Hague rules. The killing of inhabitants and the damage to their property were not altogether unavoidable. Moreover, the assault could not conceivably have possessed any real military or naval significance; it did not form part of a plan of

<sup>1</sup> Article 2.

<sup>2</sup> Article 6.

campaign ; it was not calculated to confer on the attacking fleet any strategic advantage ; it is perfectly clear—and it must have been equally clear to the commander—that no perceptible diminution of the belligerent resources of Great Britain could have thereby been effected. It was, indeed, either the result of infuriated vindictiveness, or it was deliberately planned to create a panic among the peaceful inhabitants of the coast. It is well to recall that only a short time before the raid occurred, Count Reventlow, writing in a German newspaper, observed : “ We must see clearly that in order to fight with success we must fight ruthlessly—in the proper meaning of the word.” That is, he and his countrymen appear to hold that so long as they achieve their object, they may slaughter and destroy anybody and anything at any time and by any means regardless of all law and all restraint demanded by civilization.

It may be added that shortly afterwards the Germans, in reply to universal expressions of protest, stated that the attacks of their ships were entirely within the limits of lawful warfare, as laid down by the Ninth Convention of the Hague (1907), despite the fact that the latter has no binding force, inasmuch as it has not been ratified by all the present belligerents. They pointed out that this Convention permits the bombardment of protected places, and military installations in unprotected places. According to the British official Army List, they reminded us, Hartlepool possesses coast fortifications, occupied by land forces in time of peace as in time of war ; Scarborough possesses a redoubt with six sea-firing 15 cm. guns and a barracks, and has a wireless station ; Whitby has naval coastguard and signal stations. Therefore, they argued, these places were legitimately shelled. However, such arguments, based as they are on mere legal technicalities, cannot get rid of the fact that warfare was recklessly and indiscriminately made on non-combatants, who were almost exclusively the sufferers ; and that these furious, vindictive proceedings were carried out in accordance with their

principle of ruthless slaughter, with a view to terrorizing the population. An offending belligerent is not entitled to advance such technical defences as are permitted to a prisoner in a criminal court; for there is no real analogy between the two cases. In the case of the first, the fundamental principles of humanity and civilization are the predominating factors; in the case of the latter, detailed provisions of municipal law are concerned, and are deliberately prescribed to define the various circumstances pointing to guilt or innocence.

Finally, we have to consider the use of aircraft bombs. In 1899, at the first Hague Conference, a declaration was adopted prohibiting combatants for a term of five years from launching projectiles or explosives from balloons or other kinds of aerial vessels. At the second Conference, 1907, many of the States represented agreed to forbid for a period extending to the close of the third Conference the discharge of projectiles and explosives from aircraft. But of the forty-four Powers represented, only twenty-seven signed the undertaking; the non-signatories included some of the leading Powers, for example France, Russia, Germany, Italy, Japan. Of the belligerents engaged in the present war, only Great Britain and Belgium ratified the declaration, which, therefore, cannot now possess binding force.

There are, then, few positive and specific rules as to aerial hostilities. Hence to arrive at any regulative principles we must turn to the established laws of warfare in general, and to the Hague Regulations governing land and naval bombardment in particular. We have already referred above to Article 25 of the Fourth Convention, 1907, which forbids the attack or bombardment "by any means whatever" of undefended towns, villages, dwellings or other buildings. A place can only be considered defended if measures have been taken to prevent an enemy from occupying it. If it is left open for the enemy to enter, the Hague Regulations confer on it immunity from

bombardment. The expression "by any means whatever" — "*par quelque moyen que ce soit*" — was specially added in 1907 after much discussion by the delegates, in order to prohibit also the hurling of aircraft bombs upon such places. Further, the rule as to giving notice, and the rule as to sparing in any case churches, hospitals, science and art buildings and historic edifices, are likewise applicable. Again, the general rules of warfare forbid deliberate or haphazard attacks on peaceable non-combatants; they forbid the infliction of superfluous injury, as well as destruction of property and devastation of territory not manifestly indispensable for self-preservation, or directly and imperiously demanded by the exigencies of belligerent operations. Therefore, destruction as an end in itself, or intended for the mere purpose of inflicting pecuniary loss on the hostile government or for terrorizing the population, is undoubtedly illegitimate. An airman is no less than a criminal if he flies over a town and drops bombs indiscriminately without taking every possible precaution to distinguish between centres of population and the permitted objects of attack, such as armed forces and property used or to be used in military operations. In every case, whether the attacked places are defended or undefended, the long-established usages of war and also the Hague Convention call upon belligerents of every kind, on land, on sea, or in the air, to respect the "laws of humanity," and the "dictates of the public conscience."

All these rules were violated by German airmen. To allege as an excuse or justification the existence of certain reservations to this or that article of the Hague Code is simply a futile attempt to obtain exculpation when the common law of nations is infringed. Furthermore, Germany fully subscribed to the articles forbidding bombardment of undefended places, and requiring previous notification. Nevertheless, since the commencement of the war German aeroplanes and dirigibles repeatedly bombarded localities which were undefended, and did so without warning.



During the night of August 24-25 a Zeppelin appeared over Antwerp and threw explosive bombs in parts of the town which were occupied by the civilian population, and which were at a distance from defence works or places and depôts of a military character. Several inoffensive persons were killed, several were injured, and much damage was done to private property.<sup>1</sup>

On August 30 a German aeroplane appeared over Paris and threw several bombs upon a thickly populated quarter near the Gare de l'Est. Railway stock was probably aimed at. One person was killed.

Two days later another flew towards the Eiffel Tower, dropping in populous districts several bombs which may, however, have been aimed at railway stock at the station of St. Lazare.

The following day bombs were hurled near the Eiffel Tower, and some damage was done to a private house.

In the night of September 1-2, a German dirigible dropped several projectiles on the undefended Belgian villages of Semmerzaeke and Vosselaere.<sup>2</sup>

September 4. A bomb was hurled on the open and undefended town of Eecloo.

The day after a German aeroplane appeared over Ghent, an open and undefended town, and launched two bombs.

September 25. A Zeppelin threw four bombs upon Ostend.

In the night of September 26-27 a Zeppelin dropped bombs on Deynze and Thielt. No damage was done at Thielt. Three bombs struck the Convent of St. Vincent de Paul, containing ninety nuns and over one hundred orphans, aged infirm women and refugees from Malines. A great panic resulted.

Two days later three bombs were dropped on Dottignies and two on Thielt, both open and undefended places.

On September 27 several bombs were dropped on Paris,

<sup>1</sup> *The Case of Belgium*, pp. 21-3.

<sup>2</sup> Seventh Report of the Belgian Commission; issued in the press January 1, 1915.

killing an old man and injuring a little girl, one of whose legs had to be amputated.

October 11. Two German aeroplanes flew over Paris, and threw some twenty bombs, killing five people and injuring thirteen others. One of the bombs struck and damaged the roof of the Cathedral of Notre Dame, near which is situated a hospital, the Hôtel Dieu; another fell near the National Library.

During the night of January 19, 1915, a German air raid was made on the Norfolk coast—King's Lynn, Yarmouth, Sheringham—with the result that four civilians were killed, three or four houses were partially demolished, and an old church was damaged. In this case not even the most far-fetched technical excuse was available; for the most ingenious and evasive German apologist could not claim that the act possessed any military significance, or that there was any legitimate belligerent object. The only conceivable object was to give vent to savage feelings of vindictiveness, and to strike terror into the hearts of the non-combatant population; and this object, as we have more than once emphasized, is contrary alike to the rules of international law and to the dictates of humanity. This is as obvious as anything could be; yet an official telegram from Berlin announced, with brazen effrontery, that German naval airships attacked some "fortified" places on the east coast, and that several bombs were successfully dropped.

There was a report from Petrograd, February 1, that German airmen had hurled bombs on open towns, like Libau, and that the Russian Government had decided to treat them, when captured, as criminals, and not as prisoners of war. Accordingly, the crew of the Parseval, a German dirigible destroyed off Libau, after they had been engaged in a raid on the town, were informed that they would be tried as common outlaws. It was stated in a Russian paper that two members of the crew had been employed before the war as hairdressers in Libau, and therefore must have been fully aware that the city contained neither fortifications nor garrisons.

The above are a few of the German attacks by means of aerial bombardment. In some places, for example in the case of several of the assaults on towns like Paris and Antwerp, it may be that such things as railway stock were aimed at—though this would scarcely apply to the incendiary bombs that struck Notre Dame, near which was a hospital. However, considering the large number of attempts made, the nature of the localities aimed at, the hospitals, convents, and crowded dwellings involved, the killing of defenceless civilians and the damage to private property—and all this done in the absence of military exigencies, probably in order to terrorize the population rather than to curtail the belligerent resources of the adversary—considering all these circumstances and the kindred methods of warfare adopted by the Germans in other regions, we are bound to stigmatize this conduct not merely as illegitimate, but as inhuman.

## CHAPTER XI

### METHODS OF WARFARE—(3) TREATMENT OF THE CIVIL POPULATION

IN the previous chapter we referred to various instances of the unlawful treatment of the civil population by the invading forces of Germany. Now we have to give further examples of cruelty and outrage to the inhabitants of towns and districts that came to be occupied by the invaders, and to mention other illegal proceedings, such as forcing inhabitants to give information about the position of the troops, using them as screens, forcing them to dig, etc.

As an excuse for their extremely rigorous measures—it is much nearer the truth to say shameful and barbarous conduct—in Belgium, the Germans allege that the civilians took part in the fighting. An article in the *Cologne Gazette* (August 9), written by a German army doctor, says that the German troops suffered from the “abominable deeds of the Belgian population,” men, women, and boys alike. “Belgian civilians shoot out of every house, from behind every thick bush, with blind hatred, upon everything that is German. In the very first days of the campaign we lost a number of dead and wounded through the civilians.” He relates how a young woman, armed with a revolver, shot the driver of a German military motor-car. “Naturally she was executed at once; but neither execution nor the burning of the houses frightens the people. Shot-guns were used from behind hedges, in some cases at so little distance that the flesh of the victim was burned. At Gemmenich, a few miles from Aix-la-Chapelle, in the evening of August 5, the people gathered together and stopped a sanitary column.

The escort of hussars was too weak to resist the fusillade from every house. We doctors found no protection in the Red Cross on our arms and our wagons. A number of Germans were severely wounded when trying to open a tunnel that had been blocked up. The women threw stones at the soldiers and made fun of them. . . . Then the Belgians wonder if we deal ruthlessly with civilians who are open to suspicion of guilt."<sup>1</sup>

In reply to such allegations, the Belgian authorities have repeatedly denied, on the basis of a mass of incontrovertible evidence, that the population took part in the hostilities. From the beginning of the invasion, instructions were issued every day in each town warning the civilians not to resist the invaders.<sup>2</sup> No doubt there were here and there a few inhabitants who did offer resistance, and who did make use of firearms. But the law of war provides remedies for illicit hostilities by non-combatants. Collective penalties for the acts of individuals are illegal. Savage, unrestrained reprisals on a whole community or on an entire town transcend the requirements of the law. Atrocious indignities inflicted on women and children have always been condemned—by all peoples, and in all ages; such acts have even been repugnant to the feelings of savage tribes.

August 10: Velm. The Germans, after destroying in the night the house of a leading inhabitant, carried him off in one direction, and his wife, who was half-clad, in another; she was afterwards released, and fired at, but without being hit.<sup>3</sup>

August 10, 11, 12: Orsmael and Neerhespen. An old man of the latter village had his arm sliced in three longitudinal cuts, then hanged head downwards and burned alive. In the former place young girls were violated, little children outraged, and several inhabitants mutilated.<sup>4</sup>

August 10: Linsmeau. "German cavalry occupying the village of Linsmeau were attacked by some Belgian infantry and two gendarmes. A German officer was killed by our

<sup>1</sup> *The Times*, August 14.

<sup>2</sup> *The Case of Belgium*, p. 81.

<sup>3</sup> *Ibid.*, p. 88.

<sup>4</sup> *Ibid.*

troops during the fight, and subsequently buried at the request of the Belgian officer in command. None of the civilian population took part in the fighting at Linsmeau. Nevertheless, the village was invaded at dusk, August 10, by a strong force of German cavalry, artillery, and machine guns. In spite of formal assurances given by the Burgomaster that none of the peasants had taken part in the previous fighting, two farms and six outlying houses were destroyed by gun-fire. All the male population were then compelled to come forward and hand over whatever arms they possessed. No recently discharged firearms were found. Nevertheless, the invaders divided these peasants into three groups. Those in one group were bound and eleven of them placed in a ditch, where they were afterwards found dead, their skulls fractured by the butts of German rifles." <sup>1</sup>

August 15: Visé. The Germans accused the civil population of taking part in the defence of the town, August 4, or of rising against them after it was occupied. But a judicial examination of witnesses showed this charge to be unfounded. Besides, it was only in the night of August 15-16 that the destruction of the town began. According to the declarations of witnesses the first shots were fired by intoxicated German soldiers at their own officers. However, the town was burnt, several of its citizens as well as of the village of Canne were shot, and some were sent off to Germany.<sup>2</sup>

August 18: Schaffen. Villagers found in their houses or in the streets were massacred. The names and addresses of eighteen murdered persons were given by witnesses. A woman and a daughter who were shot were thrust into a sewer. Some were tied to a tree and burned alive, others were buried alive.<sup>3</sup>

August 19: Aerschot. In the adjoining districts inoffensive citizens were shot. Many inhabitants fled in terror. At Hersselt, north of Aerschot, twenty-three persons were killed; no Belgian troops were present.<sup>4</sup>

In Aerschot itself there were no Belgian forces. Five or

<sup>1</sup> *The Case of Belgium*, p. 82.

<sup>2</sup> *The Times*, September 21, p. 6.

<sup>3</sup> *The Case of Belgium*, p. 88.

<sup>4</sup> *Ibid.*, p. 85.

six people were forced to leave their houses and were shot. In the evening, the Germans alleging that a civilian killed one of their superior officers (which has been referred to above), took a number of men, fifty at a time, to some distance from the town, grouped them in fours, and making them run in front, shot at them, and afterwards finished off the wounded with their bayonets. More than forty men were found thus massacred. The following day, several inhabitants, together with the Burgomaster, his son aged fifteen, and his brother, were shot. Survivors were forced to dig holes to bury the victims, of whom there were about 150. According to the evidence of witnesses the civil population had taken no part whatever in hostilities.<sup>1</sup> Many assaults on women and girls were reported to have taken place.<sup>2</sup>

August 19: Corbeek-Loo (a village near Louvain). “. . . A woman, 22 years old, whose husband was in the army, was surprised, with several of her relatives, by a band of German soldiers. The persons who accompanied her were locked in an abandoned house, while she was taken into another house, where she was successively violated by five soldiers.<sup>3</sup> In the same village, August 20, German soldiers were searching a house where a young girl, 16 years of age, lived with her parents. They carried her into an abandoned house and, while some of them kept the father and mother off, others went into the house, the cellar of which was open, and forced the young woman to drink. Afterwards they carried her out on the lawn in front of the house and violated her successively. She continued to resist, and they pierced her breasts with their bayonets.”<sup>4</sup>

On August 26 a woman was violated by several German soldiers and afterwards killed.<sup>5</sup>

Andenne was the scene of ferocity and cruelty, August

<sup>1</sup> *The Case of Belgium*, pp. 85-6.

<sup>2</sup> Fourth Report of Belgian Commission, *The Times*, October 5, p. 6.

<sup>3</sup> *The Case of Belgium*, p. 41.

<sup>4</sup> *Ibid.*, p. 41. Compare a statement by a Belgian nobleman, *The Times*, September 26, p. 6.

<sup>5</sup> *Ibid.*, p. 48.

19-21. On August 21 the inhabitants were driven into the streets and forced to march, with their arms raised, to the Place des Tilleuls. Those who tried to run away were shot. The Burgomaster was wounded by a rifle-shot and then killed by a blow from an axe. Afterwards some forty or fifty men were picked out, led away and shot, some along the bank of the Meuse and others in front of the police-station. Others, again, were cut down with the blows of an axe. A young boy and a woman also were shot. The Belgian Commissioners state that three hundred were massacred in Andenne and Seilles and about three hundred houses were burnt there.<sup>1</sup>

At Hastières, on August 23, a surgeon of the Red Cross, the parish priest, a schoolmaster, and many other civilians were shot in cold blood.<sup>2</sup>

On the same day at Surice, eighteen persons, including parish priests and boys, were lined up against a wall and a volley was fired. "They were not all shot dead; several were finished off by having their skulls beaten in with rifle-butts. . . . When the massacre was over the Germans plundered the corpses."<sup>3</sup>

August 22: Tirlemont. After the bombardment, for which there was no military necessity, the panic-stricken people rushed from their homes, and were made game of by the German cavalry. Fathers, escaping with their families and trying to shield them, were shot down; mothers carrying babies were belaboured with lance and sword.

In Liège, invaders ordered the houses to be kept open not only in the day, but also at night.<sup>4</sup>

Incidents exactly similar to those related above were reported from a different quarter. The Italian paper, the *Corriere della Sera* of August 21, gave particulars of massacres of Italian residents in France. At Jarny

<sup>1</sup> Eleventh Report of Belgian Commission, *The Times*, February 18, 1915, p. 9.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *The Times*, August 28, p. 1.



(Meurthe-et-Moselle) the Germans entered after losing one killed and four wounded. The townspeople were then accused of having fired on German troops, and all the male inhabitants were ordered to assemble in the principal square. The women and children who tried to accompany their husbands and fathers were driven off with the butt-ends of rifles or with bayonets. Every house was searched. In the Italian café, usually frequented by Italian miners, several picks and other implements were found. Accordingly fifteen Italians, whose names, etc., were given in the paper, were arrested and immediately shot. None of the Italians had offered any resistance or had been guilty of any offence, except remaining in possession of their working tools.<sup>1</sup>

August 21 : Tamines. This large village, situated on the Sambre between Charleroi and Namur, was occupied by French troops, August 17-19. On August 20 a German patrol appeared, and was fired on by French soldiers and by Civic Guards of Charleroi. Several Uhlans were killed and wounded, and the rest fled. The following day the Germans entered the village and at once began their work of destruction and slaughter. They rushed into the houses, drove out the inhabitants, and set fire to the buildings. Many peasants were shot; most of those who tried to escape were arrested. The next morning pillage and burning were resumed. In the evening "a group of between 400 and 450 men were collected in front of the church; . . . a German detachment opened fire on them, but as the shooting was a slow business, the officer ordered up a machine-gun, which soon swept off all left standing. Many wounded still lay among the corpses, and some of these were bayoneted." After the work of burial, the prisoners, together with their families, were taken to Vilaines, and were threatened with death if they returned. 264 houses were sacked and burnt in Tamines; and the number of victims amounted to over 650, of whom many were suffocated in their houses and others shot in the

<sup>1</sup> *The Times*, August 31, p. 7.

fields. The surviving witnesses declared that no inhabitants had fired on the Germans.<sup>1</sup>

August 21-25: Dinant. The atrocities committed here were far greater. In the night of the 21st an armoured motor-car entered the town and at once fired on the houses. Troops followed, shooting into the windows and bayoneting any one they met. "They entered the cafés, seized the liquor, got drunk, and retired after having set fire to several houses, and broken the doors and windows of others. The population, terrorized and stupefied, shut itself up in its dwellings." Early in the morning of August 23, infantry soldiers of the 108th Regiment entered a church, drove out the congregation, separated women from men, and shot fifty men. Pillage and arson followed; some trying to escape were shot. Many were driven into the Parade Square and kept there from 9 a.m. to 6 p.m. "About 6 o'clock a captain separated the men from the women and children. The women were placed in front of a rank of infantry soldiers, the men were ranged along a wall. The front rank of them was then told to kneel, the others remaining standing behind them. A platoon of soldiers drew up in face of these unhappy men. It was in vain that the women cried out for mercy for their husbands, sons, and brothers. The officer directed his men to fire. There had been no inquiry nor any pretence of a trial. About twenty of the inhabitants were only wounded, but fell among the dead. The soldiers, to make sure, fired another volley into the heap of them. Several citizens escaped this double discharge. They shammed dead for more than two hours, remaining motionless among the corpses, and when night fell succeeded in saving themselves in the hills. Eighty-four corpses were left on the square and buried in a neighbouring garden." Inhabitants who had taken refuge in the cellars of a brewery were dragged out and shot. Workmen coming out of factory cellars

<sup>1</sup> Fifth Report of the Belgian Commission, published in the press, November 21. Cf. the Eleventh Report of Belgian Commission, *The Times*, February 18, 1915, p. 9.

tried to cover themselves with a white flag, but were immediately shot. Nearly all the men of the Faubourg de Leffe were executed in a body. A machine-gun was turned on the prison court where there were men and women. And whilst all this was going on houses were pillaged and sacked, safes forced open. Women and children were shut up in a convent for four days. More than seven hundred inhabitants are stated to have been killed; others were taken off to Germany.<sup>1</sup>

August 19-28: Louvain. A harrowing chronicle of still greater brutalities and horrors. Defenceless inhabitants were called to their doors and shot with revolvers. Women were threatened they would be shot at a certain hour, and then were spared. Six hundred women were thrust into a waiting-room at the station; two priests who ventured to come and console them were led away and shot. The women were marched and countermarched without any regard being paid to their age or condition. One night they slept in the open fields and suffered hardships and insults.<sup>2</sup> In the morning of August 26, seventy-five persons, including priests and the leading citizens of the city, were led to the square in front of the station. The men were separated from their wives and children, and after much ill-treatment and threats of death they were driven in front of the German troops as far as the village of Campenhout. They were locked during the night in the church. Next day they were told that they might confess themselves, as they would be shot half an hour later. However, they were allowed to go, but soon afterwards were again arrested by German soldiers who forced them to march in front to Malines, where they were liberated. "On August 28 a crowd of six thousand to eight thousand persons, men, women, and children, of every age and condition, was conducted under the escort of a detachment of the 162nd Regiment of German infantry

<sup>1</sup> Fifth Report of Belgian Commission. Cf. *The Times*, October 1, p. 5, for an account taken from a Belgian paper, *Le Matin*, which is in full agreement with the above.

<sup>2</sup> *The Times*, September 22, p. 7.

to the riding-school of Louvain, where they spent the whole night. The place of confinement was so small in proportion to the number of the occupants, that all had to remain standing; and so great were their sufferings, that in the course of this tragic night several women lost their reason, and children of tender years died in their mothers' arms."¹

The following account given by the fugitive treasurer of the city is worth recording: "The cavalry charged through the streets sabring fugitives, while the infantry, posted on the footpaths, had their fingers on the triggers of their guns waiting for the unfortunate people to rush from the houses or appear at the windows, the soldiers praising and complimenting each other on their marksmanship as they fired at the unhappy fugitives. Those whose houses were not yet destroyed were ordered to quit and follow the soldiers to the railway-station. There the men were separated from mothers, wives and children, and thrown, some bound, into trains leaving in the direction of Germany. . . . They shot numbers of absolutely inoffensive people, forcing those who survived to bury their dead in the square, already encumbered with corpses whose positions suggested that they had fallen with arms uplifted in token of surrender. Others who had been allowed to live were driven past approving drunken soldiers by the brutal use of rifle-butts, and while they were being maltreated they saw their carefully collected art and other treasures being shared out by the soldiers, the officers looking on. Those who attempted to appeal to their tormentor's better feelings were immediately shot. A few men were let loose, but most of them were sent to Germany. On Wednesday at daybreak the remaining women and children were driven out of the town—a lamentable spectacle—with uplifted arms and under the menace of bayonets and revolvers. . . . On the Thursday the remnant of the Civil Guard were called up on the pretext of extinguishing the conflagration: those who demurred were chained and sent with some wounded

¹ *The Times*, September 8, p. 11.

Germans to the Fatherland. The population had to quit at a moment's notice before the final destruction; then, to complete their devastation, the German hordes fell back on the surrounding villages to burn them. They tracked down the men—some were shot, some made prisoners—and during many long hours they tortured the helpless women and children.”<sup>1</sup>

The Germans, in a communiqué published in the *Cologne Gazette*, August 29, justified the “chastisement” inflicted upon Louvain on the ground that a battalion of *Landwehr*, left in the town to guard the communications, had been attacked by the civil population, under the impression that the main German army had definitely retired. The Belgian Judicial Commissioners have established that this statement is false, and that the inhabitants of Louvain who had been disarmed by the communal authorities, did not provoke the Germans by any act of hostility.<sup>2</sup> The first report stated that all arms down to fencing foils had been delivered up to the municipal administration and deposited in the church of St. Peter.<sup>3</sup>

Brutalities on a smaller scale, but intrinsically just as foul and horrible as any committed in towns like Louvain, Aerschot, Dinant, are reported to have occurred in numerous Belgian villages. On August 25, at Hofstade, an old woman was bayoneted to death; “she still held in her hand the needle with which she was sewing when she was attacked.” A mother and her young son were also found killed with bayonet thrusts; a man was discovered hung.<sup>4</sup> At Sempst, a neighbouring village, two partially burnt corpses of men were found, one with the legs cut off at the knees, the other without arms or legs. A workman having been pierced with bayonets, was, whilst still alive, soaked with petroleum and locked in a house which was afterwards fired. An old man and his son were killed by sabre cuts. A cyclist was shot. A woman coming out

<sup>1</sup> *The Times*, September 8, p. 11.

<sup>2</sup> Third Report of the Belgian Commission.

<sup>3</sup> *The Case of Belgium*, p. 40.

<sup>4</sup> *Ibid.*, p. 42.

of her house was shot.<sup>1</sup> On August 26, at a place not far from Malines, an old man was discovered hanging from a beam in a barn; his body was burnt, but his arms and feet were intact. Another body was covered with bayonet wounds. Many corpses of peasants were found in a position of supplication, arms lifted and hands folded in prayer.<sup>2</sup> At Buecken numerous inhabitants, including a priest over eighty years old, were killed.<sup>3</sup> On October 5, "a rural policeman of Westonter, while making his rounds of the village to notify the inhabitants that the use of bicycles was forbidden, was surprised by a party of Uhlans, who, having seized his revolver, dragged him to the village square. Meantime, having also seized the mayor and his two assistants, they tied all four to the gates of the cemetery. The rural policeman was shot out of hand in the presence of his wife and child, whose pleas for his life were met with threats of a similar fate. The mayor and his companions fared better. They were merely lashed over the face and body by the whips of the whole party before the cavalrymen rode off."<sup>4</sup>

The venerable Bishop of Tournai, an old man and an invalid, was shut up for five days at Ath, in a nauseous place, where he had only a mattress to lie upon.<sup>5</sup> On another occasion 650 civilians, including six priests, were carried off to Germany; they were shut up in a granary and forced to sleep on straw. They were roused in the morning by blows and curses, and led into a barrack square, where an inscription was placed on their backs designating them "prisoners of war."<sup>6</sup>

The treatment of the civil population of French towns and villages was as bad as that of the Belgian people. A brief extract from a diary found on a German officer on a battlefield will throw light on this point. He was

<sup>1</sup> *The Case of Belgium*, p. 42.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, p. 48.

<sup>4</sup> *The Times*, October 8, p. 7.

<sup>5</sup> Report of a Commission charged to collect evidence from Belgian refugees in London; dated London, December 29, 1914. Cf. *The Times*, February 6, p. 7.

<sup>6</sup> *Ibid.*

himself forced to register a protest against the arbitrary proceedings and unrestrained slaughter. On August 26, the Germans marched to Nismes, and then came to Villers-en-Fagne. "The inhabitants had warned the French of the arrival of our troops," the German diary says, "by a signal from the church tower. The enemy's guns opened on us and killed and wounded quite a few. So in the evening we set fire to the village, the priest and some of the inhabitants were shot. . . . The pretty little village of Gué d'Ossus was apparently set on fire without cause. At Leppe apparently two hundred men were shot. There must have been some innocent men among them. In future we shall have to hold an inquiry as to their guilt, instead of shooting them."<sup>1</sup>

On September 8 eighteen inhabitants of Varredes were arrested without cause and led away; three escaped, and of the others three appear to have been murdered, among whom was an old man of 63. At Congis an old man was asked for his purse; not being able to hand over any money, he was bound and shot.<sup>2</sup>

At Sancy-les-Provins, September 6, eighty persons were arbitrarily arrested and thrust into a sheepfold. Next day thirty were led away three miles from the village, and were about to be shot when French cavalry came up and rescued them. To show that these proceedings had been sanctioned by the German commander, it was stated that the schoolmaster of Sancy, who was to have been led off with the others, obtained his release from General von Dutag, who had been billeted in his house.<sup>3</sup>

At Guérard, Maupérthuis, Sablonnières, Rebais, acts of violence and murder were committed.<sup>4</sup>

At Coulommiers several women of the town were the objects of criminal assaults. On September 6 a woman, whose husband was first sent away, was violated in the presence of her two small children. At Sancy-les-Provins

<sup>1</sup> *The Times*, October 19, p. 6.

<sup>2</sup> Report of French Commission, *Journal Officiel*, January 8, 1915, p. 119.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

and at Beton-Bazoches similar acts took place, the women being forced at the mouth of a pistol, in the second case in the presence of a little girl three years of age.<sup>1</sup>

Still worse assaults on girls and women, including nuns, occurred at Rebais (September 4), Saint-Denys-les-Rebais (September 7), Jouy-sur-Morin, la Ferté-Gaucher, Bezu-Saint-Germain (September 8), Congis (September 8), Chateau-Thierry (September 5), frequently in such horrible circumstances that it is difficult to believe the assailants to have been human at all.

The practice of sending motor-cars in advance of the main army, with instructions to their occupants to shoot civilians for the purpose of creating a panic, was not confined to Belgium. Early in September a motor-car, apparently containing five peaceful civilians, visited Senlis. The car had been stopped on the outskirts of the town and the travellers were asked to show their papers. These were in order, and bore the official stamp of Amiens (which had been pillaged by the invaders). The car went on and was soon afterwards stopped again. This time, instead of the papers a revolver was produced and the sentry was shot dead at his post. The car then dashed through the town, the occupants shooting as they went.<sup>2</sup>

On September 20, at Valenciennes, the mayor was ordered to draw up a list of the names and addresses of all the male inhabitants between the ages of 18 and 45 who still remained in the town. In the night many of these escaped to Lille. Uhlan patrols visited the surrounding villages, and searched every house for civilians of military age. In some cases they thrust their bayonets through the mattresses on the beds. It was reported that they succeeded in capturing five hundred or six hundred men, who were taken away to an unknown destination.

The French Official Commission of Inquiry reported that on September 22 at Combes all the inhabitants were

<sup>1</sup> Report of French Commission, *Journal Officiel*, January 8, 1915, p. 119.

<sup>2</sup> *The Times*, September 19, p. 8.



arrested, and exposed on a hill to the fire of French artillery and infantry. By waving their handkerchiefs, however, they made themselves recognized. They were subjected to the same kind of treatment the following day. Then they were shut up for five days in a church, and received uneatable food. Finally, the men were taken away to Germany, and the women and children were placed in the village church, where they remained for a month. They had only benches to sleep on. They were not allowed to move more than a few yards from the door, so that the insanitary condition of the place became horrible, and dysentery and croup spread among them.<sup>1</sup>

On October 10 some two thousand Frenchmen, who were marching towards Gravelines in order to be medically examined there for military service, were attacked by Germans, who opened fire on them with machine-guns—their favourite weapons for decimating the civilian population—at a distance of 500 yards, and killed several of them.<sup>2</sup>

The Commissioners pointed out, too, that according to undeniable evidence the French civilians who had been carried off to Germany were there treated in a shameful manner. They were placed in insanitary camps, and received poor and scanty food. In some camps the prisoners were on the verge of collapse through hunger. Yet heavy labour was imposed on them. Severe punishments were inflicted—for example, fastening the hands and feet together and tying the neck to a post—for such an offence as complaining of insufficient food. At Darmstadt a corporal struck the prisoners on the head with his sword if they failed to salute him. He bayoneted a soldier in the chest for saying that men ought not to work without food; the victim died the next day. At Gustrow, a man who stopped working for a moment to light his pipe was struck with a bayonet. Another was bayoneted to death for breaking a pane of glass.<sup>3</sup>

<sup>1</sup> Second Report of the French Commission, *Journal Officiel de la République Française*, March 10, 1915.      <sup>2</sup> *Ibid.*      <sup>3</sup> *Ibid.*

A signally illegitimate and cowardly mishandling of civilians is to use them as a screen or cover against the attacks of the armed forces belonging to their own country. Numerous instances of the practice occurred in the present war ; and all of them are to be laid to the account of the German invaders. During the operations near Dinant, the Germans, when they were exposed to the fire of the French entrenched on the opposite bank of the Meuse, sheltered themselves behind a line of civilians, including women and children.<sup>1</sup> On August 26 a German brigade compelled a number of civilians—leading citizens, women, and priests—to march in front towards Malines. An officer informed them that they were going to taste some of the Belgian grape-shot. The German troops before Charleroi forced ten miners, whom they had captured coming from their work, to march at the head of their column, which was endeavouring to enter the town. In another engagement in the same region, six civilians were made to march in front of German soldiers.<sup>2</sup> On August 25 some two hundred people—men, women, and children—of the village of Hofstade were compelled to go on in front ; and when the high road of Terveuren was reached, where Belgian troops were seen at a distance of 150 or 200 yards, the Germans fired at them from behind the screen of inoffensive civilians. The Belgian troops opened fire from the flanks only, in order to avoid hitting their fellow-countrymen. On August 29, at Hérent, the Germans forced five hundred women and children, preceded by the priests of Wygmael and Wese-mael, to march in front of their forces. On September 12, at Erpe, a German column of some two hundred or three hundred men was attacked by a Belgian armed motor-car. Whereupon the Germans seized twenty or twenty-five men and lads in their houses, and placed them across the high road. Two lads were wounded. The occupants of the motor, noticing that civilians were placed in front of

<sup>1</sup> Fifth Report of the Belgian Commission, published in the press, November 21, 1914.

<sup>2</sup> *The Times*, August 25, p. 6.

their enemy, ceased fire. One witness states that he heard an order given that all these were to be shot if the Belgians continued their fire.<sup>1</sup> At Borinage a German column marched with one hundred hostages in front, and about three hundred more in the rear. A number of civilians—men, women, and children—were forced to pass a night on the bridge over the Sambre, in order to prevent the French from bombarding it. Others, including an old priest and three younger ecclesiastics, were pushed forward towards the French firing line. Eight nuns were also stationed on the bridge to preserve it from attempts at destruction. At Tamines, Tournai, and before Malines similar practices occurred.<sup>2</sup> In Courtacon (France), on September 6, soldiers of the Imperial Guard seized five men and a child of 13 years, and during an engagement exposed them to the bullets of the French.<sup>3</sup>

Finally, we may mention one or two other illegal ways of employing civilians. Article 44 of the Hague Regulations of 1907 says: A belligerent is forbidden to force the population of occupied territory to give information about the army of the other belligerent or about his means of defence. This is an extension of Article 26 (h), which forbids a belligerent to compel the nationals of the enemy to take part in the operations of war directed against their own country, even when they have been in his service before the outbreak of the war. In signing the Convention, Germany, Austria-Hungary, Russia, and Japan made reservations on the subject of Article 44; but they are bound by Article 23 (h). The term "operations of war" contained in the latter is clearly more comprehensive than such an expression as "military operations." "Operations of war"

<sup>1</sup> Seventh Report of the Belgian Commission.

<sup>2</sup> Cf. the Report of a Commission charged with collecting evidence from Belgian refugees in England; dated London, December 29, 1914. (Referred to as the Tenth Report.)

<sup>3</sup> Report of the French Commission, *Journal Officiel*, January 8, 1915, p. 119.

would include all such acts as are immediately helpful to the enemy in the prosecution of his hostilities. To make use of forced guides—assuming that the information they give is correct—might certainly have a more drastic effect on the fortunes of a conflict than to impress them as actual combatants. It would be, therefore, futile and fatuous to contend that the use of forced guides does not fall within the general “operations of war.” And so we must maintain that to compel civilians to act as guides, no matter to what extent and for what purpose—if only the belligerent plans and arrangements are or may be thereby facilitated—is a contravention of international law, as declared by the Hague Regulations. The digging of trenches and the construction of fortifications even at a distance from the scene of hostilities, the repairing of arms, the making of munitions, would likewise tend to facilitate the offensive or defensive proceeding of the belligerent for whom such work is done. Hence to call on enemy subjects to render services of this kind is equally prohibited. On the other hand, the army in occupation may legitimately demand the services of the inhabitants of the district occupied for tending their wounded and burying their dead; and perhaps also for repairing such roads and bridges and executing such works generally as are of benefit to the entire community, and not merely to the military forces of the occupying belligerent.

Contrary to the above provisions—to mention but one or two examples—the German troops compelled (August 18) an inhabitant of Schaeffen and two inhabitants of Meldert to go in front of them through Diest and guide them to Montaignu.<sup>1</sup>

At Namur, the Germans forced inhabitants of the village of Warisoul to dig trenches near the cemetery, whilst they were exposed to the fire of the forts.

At Bierwart inhabitants were compelled to throw up defensive works along the high road.<sup>2</sup>

<sup>1</sup> Seventh Report of the Belgian Commission.

<sup>2</sup> *Ibid.*

## CHAPTER XII

### METHODS OF WARFARE—(4) ILLEGAL BULLETS—WHITE FLAG—RUSES—SPIES—ESPIONAGE AND MARTIAL LAW

(a) THE best known type of expanding bullet is that described as the dum-dum, so called from the name of the arsenal near Calcutta where it was manufactured. It appears to have been specially designed for use against certain fanatical savages, whose wild onslaughts could not be effectively checked by the ordinary kind of bullets. At the first Hague Conference, 1899, the question was raised whether such bullets were legitimate. The delegates of all the Powers, except those of Great Britain and the United States, condemned their employment in war, and thereupon adopted the following declaration: "The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions." One of the American delegates proposed an amendment prohibiting the use of all bullets, such as explosive bullets, that inflict wounds of useless cruelty, and generally every kind of bullet that exceeds the limit necessary for putting a man *hors de combat*. This amendment was supported by Great Britain, but it was not adopted. In 1907, however, at the second Hague Conference, both Great Britain and the United States notified their adhesion to the Declaration of 1899, which is now binding on all belligerents. It may be pointed out that though Great Britain withheld her signature from it in 1899, yet she did not use the bullets in question in

the South African War. Indeed, she undoubtedly regarded the Declaration as virtually binding on her, although she might have been able to argue that being a non-signatory belligerent she was not obliged to observe it. Accordingly, all dum-dum ammunition was recalled from South Africa at the outbreak of the war.

In 1863 the Russian military authorities invented a bullet that exploded when fired on a hard surface, and a few years later it was modified so as to explode when striking a soft substance. The Russian Government was prepared to forgo the use of such an inhuman instrument of war, if the other European Powers agreed to do likewise. Accordingly, a Conference of delegates from the European States and from Brazil met at St. Petersburg in 1868, and adopted the following Declaration and preamble (which has already been referred to above): "Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which would needlessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would, therefore, be contrary to the laws of humanity; the Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes (nearly fourteen ounces avoirdupois), which is either explosive or charged with fulminating or inflammable substances."

It may be mentioned that though the United States and Spain were not adherents to this Declaration, yet neither of them made use of explosive bullets in the war of 1898.

The principle laid down in the Declaration of St. Petersburg was adopted by the Hague Conference of 1907, in

Article 23 (e), which enacts, in more general terms, that it is forbidden to employ arms, projectiles, or material of a nature to cause superfluous injury. The prohibited projectiles include, no doubt, such things as glass, nails, and bits of iron of irregular shape.

In the present war various charges and counter-charges were made by some of the belligerents as to the use of these forbidden missiles. From the statements and reports that follow, there is no doubt that they were employed by at least one of the belligerents. The Belgian Commissioners of Inquiry obtained evidence that explosive bullets both for rifles and revolvers were used by German troops in Belgium—for example, when they retreated from the Belgian army at Aerschot. The following medical report was also produced as corroboration :—

“ The undersigned, physicians, attached to the 4th Regiment of Lancers of Belgium, declare that after the fight on August 26, 1914, at Werchter, we were taking care of a soldier from the 5th Regiment of Lancers. The wound which he displayed on his forearm was such that we cannot help believing that it must have been caused by an explosive bullet, as no shrapnel had been fired by the enemy during their engagement with the Lancers.

“ Signed in Ranst, August 27, 1914.

“ DR. ATTICHAUX,

“ DR. VAN DE MAELE,

“ in the presence of the Colonel attached to the General Staff.

“ (Signed) GILAIN.”<sup>1</sup>

On the evening of August 26, after the fight at Werchter, explosive bullets were picked up by Belgian officers on the ground evacuated by the German soldiers. Two of them, one for rifle and the other for pistol, were submitted, together with the relevant documents, to the President of

<sup>1</sup> *The Case of Belgium*, p. 27.

the United States by the Belgian Mission. One of these documents certified thus :—

“ The attached explosive bullets for rifle and revolver were picked up at Werchter on the ground evacuated by the enemy on Wednesday evening, August 26.

“ The Commander attached to the General Staff,

“ (Signed) DUBOIS.”<sup>1</sup>

The Belgian Commissioners in their Seventh Report confirmed the above details, and furnished additional evidence of the employment of expanding bullets by the German army operating in Belgium. This evidence included medical declarations, reports of officers who picked up such ammunition in a locality abandoned by the enemy, together with a statement to the effect that dum-dum bullets were found on the person of a Hanoverian oberleutnant.

About a fortnight after the outbreak of the war the French Government were reported to have addressed to the Powers signatory to the Hague Convention a protest against the employment by the Germans of dum-dum bullets.<sup>2</sup>

Later the German Government issued a communiqué to the American Press Association as to the alleged use of bullets of this kind by the forces of the Allies. The French Government made, however, an emphatic protest against the accusation, and suggested that this proceeding on the part of the German Government was nothing more than a device intended to justify the use of such bullets by their own troops.<sup>3</sup>

The following statement, signed by Sir E. Grey, was published in Holland : “ His Majesty’s Government declare publicly and officially that the statement made by the German General Staff to the effect that dum-dum bullets

<sup>1</sup> *The Case of Belgium*, p. 28. Austrian explosive bullets were captured in Serbia, April 17, 1915.

<sup>2</sup> *The Times*, August 28, p. 8.

<sup>3</sup> *Ibid.*, September 11, p. 8.



have been found on French and English prisoners is entirely untrue. Neither the British nor the French army has in its possession, or has issued, any but the approved patterns of rifle and revolver ammunition, which do not infringe in any respect the provisions of the Hague Convention."<sup>1</sup>

About the middle of September the German Emperor despatched a message to the President of the United States, in which he charged the French with having used dum-dum bullets.

A memorandum (drawn up October 17) was issued by the British War Office.<sup>2</sup> It referred to the vague charges that were made in Germany as to the use of expanding bullets in the British army; and it pointed out that these allegations were "not only untrue, but would appear to have been made solely for the purpose of justifying the previous issue to the German troops of projectiles which do undoubtedly contravene the Hague Convention." For, according to good evidence (it was declared), both in France and in Togoland German soldiers had been supplied with soft-core bullets with a hard, thin envelope not entirely covering the core. These are the expanding bullets expressly prohibited by the International Convention of 1899. "Such bullets of no less than three types were found on the bodies of dead native soldiers serving with the German armed forces against British troops in Togoland in August, and on the persons of German European and native armed troops captured by us in that colony. All the British wounded treated in the British hospitals during the operations in Togoland were wounded by soft-nosed bullets of large calibre, and the injuries which these projectiles inflicted, in marked contrast to those treated by the British Medical Staff amongst the German wounded, were extremely severe, bones being shattered and the tissue so extensively damaged that amputation had to be performed. The use of these bullets was the subject of a written protest by the General Officer Commanding the British troops in Nigeria to the German Acting-Governor in Togoland.

<sup>1</sup> *The Times*, September 14, p. 8.

<sup>2</sup> *Ibid.*, November 18, p. 7.

Again, at Gundelu, in France, on September 19, 1914, soft-nosed bullets (that is, those in which the lead core is exposed and protrudes at the nose) were found on the dead bodies of German soldiers of the Landwehr, and on the persons of soldiers of the Landwehr made prisoners of war by the British troops. One of these bullets has reached the War Office. It is undoubtedly expanding. . . . The British revolver bullets (which have been attacked by Germany) are solid, and of homogeneous material; therefore are not bullets with a 'hard envelope' or 'soft core,' and are *not* 'soft-nosed.' Expert medical report testifies that such bullets are not 'calculated to cause unnecessary suffering.' Thus the British army did not infringe either the Conventions or Declarations on the subject.

Later (December 5) Count Bernstorff, the German Ambassador to the United States, repeated the charges against Great Britain, and alleged that an American Company had exported 8,000,000 cartridges fitted with "mushroom bullets" for the use of the British army. Mr. Bryan, the Secretary of State, replied that notwithstanding "the information the accuracy of which is not doubted," on which the allegations were made, the company in question had manufactured only 117,000 cartridges of which 109,000 were sold; that these were made to supply a demand for better sporting cartridges with soft-nosed bullets; that they could not be used in the military rifles of any foreign Power; and that of those sold only about 8,000 were supplied to British North America and British East Africa.<sup>1</sup>

(b) The Hague Regulations expressly forbid belligerents to kill or wound treacherously individuals belonging to the hostile nation or army; to kill or wound an enemy who, after laying down his arms and no longer having means of defence has surrendered at discretion; to declare that no quarter will be given; to make improper use of a flag of truce, of the national flag, or of the military insignia

<sup>1</sup> *The Times*, January 26, 1915, p. 10.

and uniform of the enemy, as well as of the distinctive signs of the Geneva Convention.<sup>1</sup>

It may be that to give quarter is not practicable in certain circumstances, for example, when it is impossible in a confused mêlée to distinguish clearly between those who are willing to surrender and those who are not, when those who are and those who are not prepared to cease fighting are inseparably mixed up, or when a place is being stormed and such as ask for quarter do 'so at the last moment when it is too late, and when the granting of it might endanger the success of the assaulting column. All these circumstances relate to the persistent continuance of the combat. But to threaten beforehand that quarter will be refused or that prisoners will be destroyed is totally unjustifiable, even in an alleged case of imperative necessity. The German official manual declares that those who surrender and those taken prisoners otherwise may be put to death, if there is no means of keeping them and their presence is a danger to the captors. But this is undoubtedly illegitimate; for the prisoners who cannot safely be kept can be set free—as has been done in more than one war.

There is no universally agreed method of indicating willingness to surrender. Sometimes arms are thrown down or hands are raised, or the butt-end of the gun is held up; but more frequently a white flag—or failing this a white handkerchief or other substitute—is hoisted.

The Belgian Commissioners reported<sup>2</sup> that on August 6, before a fort at Liège, a party of Belgian soldiers who were unarmed and had been surrounded while digging a trench, hoisted the white flag. But the German soldiers disregarded it and continued to fire. In these circumstances the surrender ought properly to have been accepted; to kill men who ask for quarter, especially when they are unarmed, and when a temporary cessation of fire is possible, can serve no military purpose—indeed, the act is no less than cold-blooded murder.

<sup>1</sup> The Hague Convention, No. IV. (1907), Article 28, b, c, d, f.

<sup>2</sup> *The Case of Belgium*, p. 34.

On the other hand, witnesses have testified that the German assaulting columns in the combat of Schiplaeken, near Hofstade, were preceded by a white flag.<sup>1</sup> Evidence has also established that at Vottem, near the fort of Loncin, a group of German infantry having raised the white flag the Belgian soldiers approached in order to take them prisoners, when the Germans suddenly opened fire on them at close range.<sup>2</sup> On September 4, on the road from Lierre to Aerschot, German soldiers made use of a white flag in order to entrap a Belgian officer making a reconnaissance in an armed motor-car.<sup>3</sup> During the action on September 17, too, Germans were reported to have abused the white flag and other signs of surrender, which resulted in the loss of a British officer.<sup>4</sup> Another instance is given by a German soldier in a letter which, together with other material, was published in a pamphlet in Germany. The incident was given in the pamphlet under the title of "A bold exploit of two dragoons from Duisburg," and was described as a "gallant stratagem," and a "daring cavalry trick": "A patrol of German dragoons entering a village incautiously were surprised to find it occupied by the French. The majority escaped, but the two leading men were surrounded by eight French infantry soldiers. They pretended to surrender, but when a French sergeant came forward to receive their carbines, one of the dragoons, purporting to hand over his weapon, shot the man through the head, and then galloped off with his comrade. . . ." <sup>5</sup> Such proceedings are obviously acts of treachery, and as such are prohibited not merely by the "dictates of conscience," but by a written rule of international law, namely Article 23 (b) as above mentioned.

It is very difficult to draw a hard and fast line of demarcation between permissible stratagems and ruses of

<sup>1</sup> Seventh Report of the Belgian Commission.

<sup>2</sup> *The Case of Belgium*, p. 84.

<sup>3</sup> Seventh Report. •

<sup>4</sup> *The Times*, September 25, p. 8.

<sup>5</sup> *Ibid.*, October 1, p. 6.

war and illegitimate tricks and pretences. Article 24 of the Hague Regulations says: "Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered lawful." This article must obviously be read subject to the various prohibitions regarding acts of treachery. In other words, ruses and means of procuring information are not illegitimate, provided they are free from perfidy and do not involve the violation of any rule either express or tacit. All means and devices adopted by a belligerent in order to obtain an advantage over the enemy by misleading him or putting him off his guard are permissible, if they are merely exhibitions of astuteness and strategic and tactical skill and do not involve a treacherous element. Thus, it is allowable to carry out a surprise, to lay a trap or ambush, to pretend that an attack or withdrawal is being prepared, to make a small force seem larger than it is by raising clouds of dust or lighting many fires, or lighting fires where there are no forces at all, to set up dummy guns or lay dummy mines, to erect bridges and other works that are not meant to be used, to send bogus messages, despatches, and newspapers that are intended to be intercepted by the enemy, to remove badges from uniforms, to use the enemy's signals, to imitate his bugle-calls and words of command, to call upon a detachment to surrender with a threat that if it refuses it will be annihilated by approaching forces which in reality are not there, to threaten to bombard a fortified town when, in fact, the guns have not actually arrived. Some of these tricks were practised in the present war, and none of them is unlawful. In every war combatants are ready to apply the maxim of Lysander of old—where lion-skin runs short, patch up with fox-skin.

The following ruse that occurred in the present war was not unlawful. When the stone bridge at Liège was blown up by Belgians, the German soldiers proceeded to construct a bridge of boats. They had nearly completed it when it was destroyed by gunfire from the forts. Then they began

to build another, which, when it was approaching completion, was similarly demolished. It appears that a Belgian soldier from one of the forts went out disguised as a peasant, driving cows in the direction of the Germans. He milked the cows and supplied the enemy with the milk. At the same time he noted carefully the locality of the new bridge, and reported to his superiors, who were able to take full advantage of the information. The Germans, suspecting nothing, began to construct their second bridge. Again the rustic milkman appeared, and owing to his report the second bridge shared the fate of the first.<sup>1</sup> The Belgian soldier's ruse was a successful and fruitful act of espionage, and espionage, as is shown below, is not forbidden by international law.

We have already pointed out that the Hague Regulations prohibit the improper use of the enemy's national flag and uniforms, as well as of the Geneva Cross. It appears, then, that soldiers are not absolutely forbidden to use such flags and uniforms; only their "improper" use is condemned, though no criterion of impropriety in this respect is laid down. It is universally agreed, however, that they ought not to be used during a combat, and on the commencement of an attack, either on land or on sea. The *Emden*, the famous German commerce-destroyer, was reported not only to have disguised herself by erecting a dummy funnel, but also to have frequently assumed the enemy's flag, which she removed prior to attacking the hostile vessel. As to using the enemy's flags or uniforms for the purpose of facilitating an approach or a withdrawal, there is a difference of opinion among jurists and among States, and no consistent practice can be appealed to; the German military instructions appear to prohibit such use, the French instructions allow it.<sup>2</sup> However this may be, soldiers through lack of clothing are not debarred from wearing uniforms captured from the enemy, provided the

<sup>1</sup> *The Times*, September 9, p. 7.

<sup>2</sup> As to the use of neutral flags by enemy vessels, see *infra*, Chap. XIX, *in init.*

distinctive badges be first removed. The latter, then, appears on principle to be the only "proper" use of the enemy's uniform—that is, when it is put on through insuperable necessity, and not with the intention to deceive the enemy. Thus, when a party of Germans dressed themselves in French uniforms, which had apparently been taken from prisoners, and made an attempt to blow up the railway-bridge at Oissel, near Rouen, their act was illegitimate. If captured, they would not be entitled to the treatment of prisoners of war, but would be liable for their "war crime" to the extreme penalty of martial law.

We may state here, in connection with this incident, that there are many acts that are not deemed unlawful when committed openly by members of the armed forces; but they may be "war crimes" if they are done or attempted in occupied territory or within the enemy's lines either by civilians or by soldiers in disguise. For instance, a number of soldiers in their regular uniform are sent into the rear of the enemy to destroy a bridge or a line of communication, to wreck a military train, or cut off a water supply, etc. If they are captured they ought not to be punished for a "war crime," as such acts are regarded as acts of legitimate warfare, which they meant to carry out openly as soldiers; hence they are entitled to be treated as prisoners of war. Had they, on the contrary, assumed civilian clothes, their fate would be different. Thus, in the Russo-Japanese War, 1904, two Japanese officers, disguised as Chinamen, attempted to blow up a railway-bridge in Manchuria, in the rear of the Russian forces. They were caught in the attempt, and, brought before a court martial, their identity was discovered, and they were executed.

Again, the Red Cross flag must not be used on wagons or other transports carrying anything other than medical or sanitary stores. Combatants are not permitted to escape in a hospital train, or to seek protection by fraudulently attaching a Red Cross badge to their sleeves, or otherwise. No one sheltered in a tent flying this flag may commit any act of hostilities. A building protected by the Red Cross

must not be used as a military depôt or observatory. Conversely, a building that is not devoted to services prescribed by the Geneva Convention must not fly the Red Cross flag.

Several instances were reported of the abuse of the Red Cross on the part of German soldiers. At Shaeskerke, near Ostend, a German who was taken prisoner, armed with a rifle, a regulation Mauser pistol, and a Browning, bore a Red Cross badge on his arm. Before capture he was seen using the rifle and one of the pistols.<sup>1</sup> Again, during the battle of the Aisne a British officer, who was captured by the Germans and subsequently escaped, reported that whilst he was in the hands of the enemy he saw men who had been fighting afterwards put on Red Cross brassards. That this illegitimate trick was not uncommon was confirmed by the fact that on one occasion German soldiers in their regular combatant uniforms were captured, and were found wearing the Red Cross armlets which they had hastily assumed. The excuse given was that they had been detailed after a fight to look after the wounded. A cavalry officer also reported that the driver of a motor-car with a machine-gun mounted on it, which he captured, was wearing the Red Cross.<sup>2</sup>

• (c) Next, we have to make a few observations on espionage; for we have heard a great deal about spies in the present war. There is no provision in international law to prevent a belligerent from getting information in regard to the enemy, the enemy's country, his preparations, safeguards, measures taken for offence or defence, and the like. But to carry out this purpose, not every method may be adopted; nothing, for example, may be done that is contrary to the Hague Rules, and to all other generally recognized principles of international law. So far as the field of operations is concerned, such information may be obtained not only by reconnoitring, but by intercepting messages, questioning prisoners (who may not, however, be compelled to answer under pain of rigorous treatment),

<sup>1</sup> *The Times*, September 14, p. 7.

<sup>2</sup> *Ibid.*, September 25, p. 8.



bribing enemy soldiers and civilians (a proceeding allowed by military practice, though condemned by many writers), and by using secret agents and spies. Espionage, then, is not an offence against international law; it is made an offence by the captor's martial law or municipal law, as the case may be, and is punished for reasons of self-preservation, and with a view to deterring others from seeking information in that manner.

According to the Hague Regulations, espionage is the act of a soldier or civilian who clandestinely or under false pretences obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the other belligerent.<sup>1</sup> It is to be noted that nothing is said of the spy's nationality or motive, which are both immaterial. It follows from this definition that a soldier who, undisguised, manages to make his way into the enemy's military zone is not a spy, and therefore if he is captured he must be treated as a prisoner of war. Similarly, a despatch-bearer or messenger, either military or civilian, even if using aircraft, is not a spy if he executes his mission openly.<sup>2</sup> Further, it is provided that a spy who, after having rejoined his army, is subsequently captured by the enemy is to be treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.<sup>3</sup> But it would appear that a civilian who, having acted as a spy, is arrested at a subsequent date and after his spying adventure had come to an end, is liable to punishment for his previous act. To aid or harbour a spy is equally punishable. In earlier times, a spy was liable to be shot on the spot without any judicial proceedings or formalities whatever. Now, by Article 30 of the Hague Regulations, a spy taken in the act must not be punished without proper trial. The procedure and the law to be applied are not, strictly speaking, matters of international law, but depend solely on the martial law imposed by the captor's State or army. The punishment is hanging or shooting; usually the latter method of execution is adopted.

<sup>1</sup> Article 29.

<sup>2</sup> *Ibid.*

<sup>3</sup> Article 81.

Martial law in the field is to be distinguished from martial law brought into being on other occasions besides that of war by the direct authority of the Government. The latter will be referred to below. The former comes into existence the moment military operations begin against the adversary. Its scope is extended on the field of battle, and still more enlarged on invaded or occupied territory. It applies, therefore, not only to the belligerent forces, but also to other persons found within the line of military operations, as well as to all inhabitants, belonging to neutral States or otherwise, found in invaded or occupied territory. In occupied territory the administration of the previously existing civil and criminal law may be permitted to continue. The rules enforced by the commander in regard to enemy soldiers or civilians must not be inconsistent with the established laws and usages of war. It is obvious, then, that here the military authorities have a wide latitude; and their conduct will, naturally, depend—apart from the comparatively few limitations imposed by international law and usage—on their humanity and honour, on their sense of fairness and sense of justice. But in no case does martial law justify military oppression. Thus, this martial law is not really law at all in the ordinary sense of the term. It is simply military rule and dictation exercised through the exigencies of war, and its stringency will depend on the circumstances of each case, for example, on the amount of danger to which the army is exposed. As was said in an American case: "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is under his supreme control."<sup>1</sup> And the Duke of Wellington described it in the House of Lords as being "neither more nor less than the will of the general who commands the army." But he added that the general is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out;<sup>2</sup> and, we may say, he is equally bound to cause alleged offences

<sup>1</sup> *U. S. v. Diekelman*, 92 U. S. 520.

<sup>2</sup> *Hansard*, 8rd series, vol. cxv. p. 880.

to be tried by a military court before he inflicts any punishment.

According to reports, many persons were executed as spies in the present war; and in some cases wrongfully. The following account, if substantially true, shows an extraordinary perversion of military justice, and a deliberate violation of the Hague Regulations we have just been considering. On September 17 the Abbé Delébecque, formerly a professor at the College of Our Lady at Dunkirk, was returning on his bicycle to his parish at Maing, when he was arrested by a patrol of Uhlans. He was taking a number of letters from French soldiers at Dunkirk to their families, and had no incriminating documents in his possession. He was tried at midnight by a court martial, was condemned as a spy, and was shot at daybreak at the foot of the Dampierre column in the outskirts of Valenciennes. The German military governor of Valenciennes subsequently issued a proclamation stating that the Abbé was the bearer of despatches from the French Government, and that these were found in his possession. In the first place, it appears that this statement was entirely untrue; and secondly, had it been absolutely true, no act of espionage had been committed. Hence the execution of the Abbé was nothing less than a cold-blooded murder.

We have seen that before a person may be condemned for spying in the sense contemplated by international law, three points must be established: first, the stealthy nature of his act, or false pretences; secondly, that it was committed within the zone of belligerent operations; and thirdly, his intention to communicate it to the hostile party. Thus Article 29 does not apply to inhabitants of occupied territory or to enemy subjects living in or visiting a belligerent's country, who communicate or attempt to communicate information to the enemy. They may, strictly speaking, be outside the zone of military operations. They may, without adopting any disguise or without using any clandestine methods or false pretences, send to the enemy reports of what they themselves observe, or reports furnished to them

by paid agents. In such cases they are not committing acts of espionage; but their conduct may, none the less, amount to a "war crime" or "war treason."

These considerations bring us to the Lody case and to that second kind of "martial law" mentioned above. When there exists a state of war, or rebellion, or riot, or when invasion is imminent, the Crown and its officers are entitled to make whatever arrangements and take whatever precautions are thought necessary in addition to, or in substitution for, the existing law. According to the universal maxim, the safety of the commonwealth is the supreme law. Hence the Crown has the right, apart from provisions laid down by the written law, to take these exceptional measures and use the necessary force in order to restore peace and order. The exercise of this right and the employment of this unusual force are covered by the term "martial law." Now this is not to be confused with military law. The law of the realm applies to all citizens, all inhabitants within our territory, soldiers as well as civilians. A man may be a soldier, but he still remains a citizen, and so is subject to the ordinary civil law. But, as a soldier, he has further responsibilities; he is also subject always and everywhere, in time of peace and in time of war, to a special body of rules, namely, military law, which is a written code consisting of the Army Act, the King's Regulations and Orders for the Army, and Army Orders. This body of law is sanctioned and brought into being each year by the Army Act. In time of peace the Crown may not issue commissions to try civilians by martial law. At other times, when it has been proclaimed, not all offenders are necessarily tried by court martial; the ordinary courts remain and continue their work. The proclamation of martial law simply empowers the military authorities to take exceptional measures for dealing with the new circumstances that have arisen, and summarily to arrest persons resisting the authority of the Government or aiding or abetting rebels or the enemy, and also persons suspected of doing any of these things. The measures taken may, of course, be preventive as well as

punitive. Serious offences may be tried by a General Court Martial, which is convened by the Commanding Officer of the district, and the penalty of death may be inflicted. Whilst martial law is in existence the ordinary courts are not entitled to question the legitimacy of the proceedings of the military authorities, and the legality of the sentences pronounced by the courts martial. But when the state of war, rebellion, or riot is at an end and martial law disappears, any seemingly illegitimate act done by the military authorities is examinable in the ordinary courts. To meet such a contingency, however, Acts of Indemnity are passed by Parliament, for the purpose of protecting these authorities, if they have acted in good faith, and also, it may be, for making compensation to innocent persons who happen to have suffered through such action.

But a general proclamation of martial law is not deemed necessary, when the actual seat of war is at a distance from the country. The statutory orders and departmental rules are then thought adequate to meet the needs of the prevailing circumstances, especially in regard to certain specified areas.

Whilst under the British system, as also under the American, these exceptional conditions for the whole country are brought about by a "proclamation of martial law," under continental systems they usually come into existence by a declaration of a "state of siege," or "state of war." Thus, in Germany the Emperor, as soon as he thought hostilities to be imminent, decreed a state of war, in accordance with Article 68 of the Constitution of the German Empire. A similar decree was issued afterwards in Bavaria, which is a separate kingdom. Article 68 says: "The Emperor may, if the public safety in the federal territory is threatened, declare every part thereof in a state of war. Until the issue of an Imperial law regulating the prescriptions, the form of notice, and the effects of such declaration, the provisions of the Prussian law, June 4, 1851, hold good." As a consequence of this "state of war," various military measures

were at once taken, for example, safeguarding the frontiers, protecting the railways, restricting all communications, telegraphic and postal, and transport services for the benefit of the military authorities, prohibiting the publication of the movements of troops and war material, etc.

The martial law that was put into force in the Lody trial was designated by the prosecution the customary international military law, and is akin to the martial law administered by a belligerent commander. Lody, a German subject, was charged before a General Court Martial (October 30) with attempting to give information to the German Government with regard to the defences and war preparations of Great Britain, in two letters despatched respectively from Edinburgh and Dublin in September, 1914. As the offence was not committed, strictly speaking, "within the zone of operations of a belligerent," it could not amount to "espionage," as contemplated by Article 29 of the Hague Regulations. The offence, then, was described as a "war crime" or "war treason," of which the accused was found guilty, was sentenced to death, and was later shot.

Military authorities, however, appear to hold the view that when the British Empire is at war, any portion of its territory is, so far as enemy aliens are involved, within the "zone of operations." If a strict interpretation of the term be adopted, this view is scarcely tenable; but, on the other hand, the contention is perfectly justifiable, if the expression is less narrowly construed, and regard is paid to the exigencies of the war, which prevail at home as well as in the theatre of operations, to the constant communication between the home Government and the military commanders in the field, and the consequent necessity to take stringent protective and punitive measures even in places distant from the actual scene of warfare. At all events, though battles may never actually take place within our territory, a "state of war" came into existence in this country with the outbreak of hostilities; so that it may be

said—as the Court held in *Marais' case*<sup>1</sup> (1902)—that, by reason of the “state of war,” martial law may be exercised even in localities beyond the range of active hostilities.

It was stated in various places that the Lody court martial was held under the Defence of the Realm Act, No. 1 (August 8, 1914),<sup>2</sup> but this was not so. The latter Act empowered the King in Council to make regulations for the trial and punishment by court martial of certain classes of persons who may be included under the designation of “spies,” “in like manner as if such persons were subject to military law and had on active service committed an offence under sect. 5 of the Army Act.” Such Regulations were issued,<sup>3</sup> of which clause 27 prescribes penal servitude for life as the maximum penalty, in accordance with the provision of sect. 5 of the Army Act.<sup>4</sup> Shortly afterwards (November 27), however, the Defence of the Realm Consolidation Act<sup>5</sup> was passed, of which sect. 1 (4) says: “Provided that where it is proved that the offence is committed with the intention of assisting the enemy, a person convicted of such an offence by a court martial shall be liable to suffer death.” Thus, there is now statutory authority for punishing such an offence with the supreme penalty which, in the case of Lody, was inflicted conformably to the customary international martial law.

In conclusion, it may be mentioned that Lody, instead of being tried by court martial, might well have been brought before an ordinary criminal court on a charge of high treason, in accordance with our common law. Though he was a foreign subject, yet during the time that he remained within the jurisdiction of another State he owed allegiance to the territorial sovereign. We may recall the

<sup>1</sup> *Marais v. The General Officer commanding the lines of communication and the Attorney-General of Cape Colony; ex parte D. F. Marais*, L. R. (1902) App. C. 109 (Judgment of the Judicial Committee of the Privy Council, delivered by the Lord Chancellor, Lord Halsbury.

<sup>2</sup> 4 & 5 Geo. V. C. 29; *Manual of Emergency Legislation*, p. 18.

<sup>3</sup> *Ibid.*, pp. 148, 151-4.

<sup>4</sup> 44 & 45 Vict. C. 58.

<sup>5</sup> 5 Geo. V. C. 8. *Manual of Emergency Legislation*, Supplem. No. 2, p. 14.

case of De la Motte,<sup>1</sup> a Frenchman, which bears some resemblance to that of Lody. De la Motte was a French colonel resident in London. In 1781 he was tried at the Old Bailey for sending reports to his Government with regard to British forces and ships; he was convicted and hanged. A trial by court martial, however, possesses certain advantages—the proceedings are on the one hand less public, and on the other much more expeditious.

<sup>1</sup> 21 *State Trials*, 687."

#### ADDENDUM.

In connection with this chapter, we may add that, since the above was printed, reports came that the Germans had made use of various illegitimate methods and instruments of warfare, besides those already mentioned. Thus they poisoned wells in Africa—a practice the unlawful character of which was recognized in the South African War and the Russo-Japanese War. They threw blazing petrol at the trenches of the allies—a proceeding that is not countenanced by international law. Further, they diffused asphyxiating gases among their enemy; such conduct being not only unlawful under the international declaration made in 1899, but contrary to humanity and civilization. In certain previous wars, e.g. the Crimean War, the American Civil War, the Franco-German War, it was suggested here and there that noxious gases should be used; but the suggestions were rejected as being inconsistent with civilized warfare.



## CHAPTER XIII

### MILITARY OCCUPATION—REQUISITIONS AND CONTRIBUTIONS—PRIVATE PROPERTY—PILLAGE—HOSTAGES

(a) THE essential principles of the law of military occupation are now laid down in the fourth Convention of the Hague Conference, 1907. Article 42 says that territory is deemed to be "occupied" only when it is actually placed under the authority of the hostile army; and the consequences of occupation apply only to those places where such authority is established and can be exercised. Obviously, then, there can be no occupation of a particular locality unless the assumed authority be supported by a force strong enough to maintain it. Hence a merely temporary existence of such force is not sufficient; for as soon as it ceases to be effective in a given place, there military occupation ceases with it. A mere proclamation by the commander of an invading force that certain territory is to be considered occupied by him—that is, a "paper" occupation—and also presumptions of a "constructive" (as opposed to an actual) occupation of a neighbouring territory will not suffice. Invasion is not equivalent to occupation; the national troops must first be ousted from the invaded territory. Nor is military occupation equivalent to conquest. Conquest implies the complete and permanent subjection of the country occupied to the Government of the occupying forces, with the intention that this territory shall be incorporated into the dominions of the new sovereign; that is, conquest implies "firm possession," together with intention and ability to retain the territory so acquired.

The following article defines in very general terms the authority of the occupant: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and assure, as far as possible, public order and safety [*l'ordre et la vie publics*] while respecting, unless absolutely prevented, the laws in force in the country."<sup>1</sup> The word "safety" does not precisely express the significance of the original words quoted above, which imply also the entire social and commercial life of the community. The authority of the occupying commander is by no means that of a sovereign. It is merely provisional and is founded on military necessity. The inhabitants owe him no allegiance. Therefore, unless such military necessity renders it absolutely impossible, he must enforce the existing territorial law, and must not interfere with the established rights and obligations of the inhabitants—for Article 23 (h) of the Hague Regulations says that belligerents are forbidden "to declare extinguished, suspended, or unenforceable in a court of law the rights or rights of action of the nationals of the adverse party." Any modifications that are found indispensable to the state of occupation must not be antagonistic to the rules of international law in general, and to those of military occupation in particular. Such variations of, and additions to, the criminal and administrative departments of public law as fall within the superimposed system of martial law, must be in accordance with the demands of honour and justice.

Then there are further restrictions, some of which have already been mentioned in reference to other circumstances. For example, the commander in occupation is forbidden to compel local inhabitants to give information about the opposing army or means of defence,<sup>2</sup> or to force them to engage in warlike operations.<sup>3</sup> He may not compel them to take an oath of allegiance to him or to his sovereign.<sup>4</sup> He must respect family honour and rights, the lives of indi-

<sup>1</sup> Article 43.

<sup>2</sup> Article 44.

<sup>3</sup> Article 23 (h).

<sup>4</sup> Article 45.

viduals, their religious convictions and freedom of worship, as well as their private property. Private property is not to be confiscated by reason of the fact that it belongs to an enemy.<sup>1</sup> Pillage or loot is prohibited.<sup>2</sup> (This does not apply to the booty permissible on the field of battle—for example, horses, equipment, military documents, etc.) No right to collect taxes is conferred on the occupant, but the practice is recognized. “If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as possible, in accordance with the rules of assessment and incidence in force, and he shall in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that to which the legitimate Government was bound.”<sup>3</sup> The phrase “imposed for the benefit of the State” denies, by implication, the right to levy rates that fall within the sphere of local administration. The revenue obtained from the taxes permitted must be applied primarily to defray the cost of the general government of the country; if any surplus remains, it may be applied for the purposes of the occupying commander and his army. No new taxes, that is other than those previously in force, may be imposed—for the right to levy taxes is an attribute of legal sovereignty, and the occupant is by no means the legal sovereign.

Should, however, the revenue derived from the available taxes be inadequate to meet his legitimate needs, then the commander may resort to requisitions and contributions, which may be demanded from individuals as well as from municipalities. And Article 49 specifically limits the devotion of money contributions to the needs of the army and the administration of the occupied territory. Contributions must not be extortionate; they should be adjusted to the resources of the particular locality. In order that these burdens may be distributed evenly, regard must be had to the prevailing rules for the assessment and incidence of taxes.<sup>4</sup> It is forbidden to collect any contribution, save

<sup>1</sup> Article 46.<sup>2</sup> Article 47.<sup>3</sup> Article 48.<sup>4</sup> Article 51.

under a written order and on the responsibility of the commander-in-chief; and for every contribution obtained a proper receipt is to be given,<sup>1</sup> stating the sums supplied. The receipt does not necessarily imply a promise to repay on the part of the occupant; it is merely evidence that certain money and commodities have been furnished, in case the contributors are afterwards indemnified by their own Government. It is clear, then, that contributions must not be exacted by the occupant in a despotic or arbitrary manner; they are not to be exacted for the purpose of enriching himself or for meeting the expenses incurred previous to occupation, or for forcing an obstinate enemy to submit. Even the German official manual sets a limit to the imposition of money contributions; it says they may be raised only in place of taxes, instead of requisitions in kind, and by way of penalty.

As to requisitions, Article 52 says: "Neither requisitions in kind nor services can be demanded from communities (communes) or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to imply for the population any obligation to take part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Supplies in kind shall, as far as possible, be paid for in cash; if not, their receipt shall be acknowledged, and the payments of the sums shall be made as soon as possible." From the foregoing it would appear that the exaction of articles of luxury, such as cigars, wine, etc., is unjustifiable. The inhabitants must not be pressed to the extent of depriving them of their necessary means of subsistence. The "services" mentioned relate to those of artisans and labourers, as well as to the occupiers of houses in which troops are quartered; but no services may be required that involve participation in any kind of belligerent operations.

Disobedience to any of these legitimate demands is punish-

<sup>1</sup> Article 51.

able. But the punishment must be confined to the actual offender, and must not be made to operate vicariously. For Article 50 distinctly lays down that "no general penalty, pecuniary or otherwise, may be inflicted on the population on account of individual acts for which it cannot be considered as collectively responsible." It follows from this rule that if bridges, transports, means of communication, etc., are damaged by individuals, those individuals must be sought out by the occupant and punished according to his martial law; no penalty is to be imposed on the entire community, if it did not authorize such acts. The Hague Regulations say nothing about hostages, who are frequently taken as a guarantee against prohibited acts in occupied territory, as well as to ensure the prompt supply of contributions and requisitions. But they must not be used for covering a retreat or effecting an advance; they must not be taken for the purpose of preventing their country from continuing legitimate hostilities. In no case may they be put to death for what they are not personally answerable; nor may they be made to suffer indignities or any ill-treatment at the hands of their captors.

Finally, as to the treatment of property within the occupied territory, we have already referred to Article 46, which has been described as the "magna charta of war law"; it not only forbids the confiscation of private property, but demands respect for it. Article 53 provides for the appropriation of certain movable property belonging to the State, and for the seizure and temporary use only of certain kinds of private property. "An army of occupation shall take possession only of cash, funds, and realizable securities [*valeurs exigibles*], which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all such movable property of the State as may be used for military operations. Apart from cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depôts of arms, and, generally, all kinds of war material may be seized, even though they belong to private

persons, but they must be restored and compensation arranged for at the peace." It follows from this Article that such property as belongs to the State only nominally, but which belongs really to private people—for example, the funds of savings banks—should be exempt from seizure. A similar immunity would apply to funds of which the State is mere trustee, for example, State national insurance or pension funds. Article 55 makes provision with regard to immovable State property. "The occupying State shall be regarded only as administrator and usufructuary of the public buildings, landed property, forests, and agricultural undertakings belonging to the hostile State and situated in the occupied territory. It must protect the capital of such properties, and administer them according to the rules of usufruct." Generally, property subject to the use of usufruct must be so used that its substance will suffer no damage. But certain kinds of State property must be respected as private property. "The property of local authorities ('communes'), and that of institutions devoted to religious worship, charity, education, science, and art, even when belonging to the State, shall be treated as private property. All seizure or destruction of, or wilful damage to, such institutions, historic monuments, and works of science and art, is forbidden, and should be made the subject of legal proceedings."<sup>1</sup>

As a sanction for these rules and for all the other Hague Regulations, an Article in the preliminary part of the present Convention says: "A belligerent party that violates the provisions of the said Regulations shall, if the case demands, be held liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."<sup>2</sup>

(b) Let us now see how these rules of international law fared at the hands of the German invaders in Belgium and France.

It will be well to begin with what promised to be fair

<sup>1</sup> Article 56.

<sup>2</sup> Fourth Convention (1907), Article 8.

and legitimate proceedings on the part of the invading army. When the latter reached Brussels, the commander, General Sixtus von Arnim, had an interview with the Burgomaster (August 20), and the following points were agreed upon: (1) The free passage of German troops through Brussels; (2) the quartering of a garrison of 3,000 men in the barracks of Daily and Etterbeek; (3) requisitions to be paid for in cash; (4) respect for the inhabitants and for public and private property; (5) the management, free from German control, of public affairs by the municipal administration. The next day the following proclamation was placarded in Brussels: "German troops will pass through Brussels to-day and on the following days, and are obliged by circumstances to demand from the city lodging, food, and supplies. All these matters will be regularly arranged through the municipal authorities. I expect the population to conform without resistance to these necessities of war, and in particular to commit no act of aggression against the safety of the troops, and promptly to furnish the supplies demanded. In this case I give every guarantee for the preservation of the city and the safety of its inhabitants. If, however, there should be, as there has unfortunately been elsewhere, any act of aggression against the soldiers, the burning of buildings, or explosions of any kind, I shall be compelled to take the severest measures.—*The General Commanding the Army Corps, SIXTUS VON ARNIM.*"<sup>1</sup>

The Germans re-established the tramway, telephone, and postal services; and certain train and telegraph services were allowed to continue. On the whole, this was, so far as it went, a satisfactory fulfilment of the requirements of the Hague Regulations. Very soon, however, a rigorous military rule was inaugurated. The movements of the civilian population were too much restricted. Inhabitants began to be arrested for acts of minor importance. All newspapers in the city ceased to appear.<sup>2</sup> (We shall refer to Brussels again at the end of the present chapter.)

<sup>1</sup> *The Times*, August 24, p. 5.

<sup>2</sup> *Ibid.*, August 27, p. 6.

On September 3 the Germans entered Crépy, a small town north of Paris, and a proclamation was immediately issued by the German commander. The following were the principal requirements, of which some were too stringent and others unjustifiable as being obviously liable to dreadful abuse: All arms were to be handed in at the Town Hall at once; all civilians found with arms would be shot at once; no person was to be in the streets after dark; no lights were to be maintained in the houses or streets at night; the doors of all houses were to be left open; the inhabitants were not to collect in groups; any obstruction or threatening of German troops would be immediately punished with death; German money was to be accepted at the rate of 1 mark for 1 fr. 25.<sup>1</sup>

Reims was occupied by the Germans, September 3, and on the 12th a proclamation was posted up throughout the town threatening—contrary to international law—to exact excessive reprisals, to inflict collective penalties, and to hang leading citizens, who were seized as hostages, for the slightest act of disorder on the part of the population. “In the event of an action being fought either to-day or in the immediate future in the neighbourhood of Reims, or in the town itself, the inhabitants are warned that they must remain absolutely calm and must in no way try to take part in the fighting. They must not attempt to attack either isolated soldiers or detachments of the German army. The erection of barricades, the taking up of paving-stones in the streets in a way to hinder the movements of troops, or, in a word, any action that may embarrass the German army, is formally forbidden. With a view to securing adequately the safety of the troops and to instil calm into the population of Reims the persons named below have been seized as hostages by the Commander-in-Chief of the German army. These hostages will be hanged at the slightest attempt at disorder. Also the town will be totally or partly burnt and the inhabitants will be hanged for any infraction of the above.” These menaces were followed by the names of 81 of the

<sup>1</sup> *The Times*, September 18, p. 8.



leading citizens of the city, with their addresses, including four priests, and concluded with the words "and some others."<sup>1</sup>

During the occupation of Ostend, the rigour of military rule was increased from day to day. At first nobody was permitted to appear in the streets after 8 o'clock, and all lights had to be extinguished an hour later. Then gradually the latter hour was moved forward to seven o'clock. Not more than five persons were allowed to be in conversation together in the streets. Later, the number was reduced to three, and soon afterwards nobody was allowed to leave his house except on specific business. Any infringement of this regulation was punishable with instant death.<sup>2</sup> We saw above that it is the duty of the occupying commander to ensure the continuance of the social and commercial life of the inhabitants of the occupied territory, and respect the prevailing laws unless it be absolutely impossible. In the present case, as in many others during the war, there was nothing to show that to do so was really impossible.

At Louvain, as soon as the Germans entered the city, they liberated from imprisonment nine of their countrymen who had been properly convicted for murder, theft, and other felonies.<sup>3</sup> Article 43 calls upon the occupant to respect the laws in force in the country occupied.

When in the early part of September the German army entered into occupation of the neighbourhood of Liège (comprising several communes), the officer in command issued a proclamation, of which some of the demands were downright illegitimate and others abominably arrogant. It was to the following effect: Before 6 p.m., September 6, all arms, etc., in the possession of citizens were to be delivered up under penalty of being shot on the spot. No persons were to be out of doors after 7 p.m. All rooms were to be thrown open in case of domiciliary visits by German soldiers. Hostages, including priests, burgomasters,

<sup>1</sup> *The Times*, September 18, p. 8.

<sup>2</sup> *Ibid.*, November 24, p. 7.

<sup>3</sup> Reported by the treasurer of the city of Louvain; *ibid.*, September 8.

and members of the communal authorities, were detained, whose lives were at stake if the population did not "keep quiet in all circumstances"; other hostages selected by the commanding officer were to be changed, and if the required substitutes did not appear promptly the detained persons were liable to be shot. Carts, bundles, etc., were liable to be searched. No one could have more than a certain quantity of petrol, etc. Any person not obeying instantly the order "hold up your hands," was liable to be put to death. Any one circulating false news calculated to injure the morale of the German troops, and any one trying to do anything injurious to them might be shot on the spot. The eighth clause, which no self-respecting person could possibly tolerate, was this: "I require that all civilians moving about in my sphere of command, and especially those of Beyne, Hensay, Bois de Breux, and Grivegnée, shall show respect to German officers by taking off their hats, and bringing their hands to their heads in a military salute. In case of doubt whether an officer is in question *any* German soldier should be saluted. Any one failing in this must expect a German soldier to exact respect from him by any method."¹

(c) Of the way family honour and the lives of individuals were respected—as laid down by international law—we have seen examples above, and particularly in previous chapters (Chapters X and XI). We have also seen, in our discussion of the treatment of towns (Chapter X), how property, both that belonging to the State and that belonging to private persons, was disregarded in the indiscriminate destruction, and how frequently private property was pillaged, in contravention of the Hague Rules. Here we have to draw attention to some special cases.

During the German invasion of Poland, it was reported that the German armies took with them great numbers of threshing-machines. The crops were reaped and sent off to Germany.

¹ *The Times*, September 24, p. 6.

Specific instances of confiscation were mentioned by the Belgian Commissioners.

The Germans entered Louvain on August 19, 1914, and, after requisitioning food and lodgings for their troops, entered every private bank of the city and took over the bank funds.<sup>1</sup>

At Hasselt, on August 12, 1914, the Germans confiscated the funds of the branch of the National Bank, which amounted to 2,075,000 fr.<sup>2</sup>

"At Liège, on entering the city," the Belgian Commissioners declared, "they forcibly seized the funds of a branch of the same bank, amounting to 4,000,000 fr. Moreover, on finding at that branch bundles of five-franc bank-notes, representing an amount of 400,000 fr., and which were not yet signed, they forced a printer to sign those bank-notes by means of a rubber stamp which they had also seized; and they afterwards put them in circulation. The National Bank, in spite of its title, is a private institution. Far from being an institution of the State, administered by officials, it is a shareholders' corporation, the capital being obtained by subscription of private parties. Stockholders participate in its administration by representation. The right conferred upon the bank to issue notes, as well as its quality of a State depository, explains and justifies the Government's intervention in the bank's organization. This intervention, however, does not in any way affect the bank's autonomy."<sup>3</sup> The Commissioners added that the private character of the Belgian National Bank was even more apparent than that of the French National Bank of 1870, which was then respected by the Germans in the Franco-Prussian War. Thus, on September 4, 1870, the Prussians, having entered Reims, were about to confiscate the funds of the branch establishment of the Banque Nationale de France. When the directors pointed out to them that it was a private institution, and as such entitled to immunity, the Crown Prince Frederick ordered that the funds found there, or at other

<sup>1</sup> *The Case of Belgium*, p. 40

<sup>2</sup> *Ibid.*, p. 16.

<sup>3</sup> *Ibid.*, pp. 16, 17.

branches of the Banque Nationale, should not be seized, so long as they were not used for the maintenance of the French army.<sup>1</sup> In 1870, then, the German authorities acknowledged the illegality of proceedings to which they— notwithstanding the additional sanction of the Hague Regulations—resorted in the present war.

Further, the Germans seized the funds of post-offices in many Belgian towns and villages that were occupied by them. The confiscation of these funds also deprived large numbers of working people of their savings, which had been deposited in the Caisse d'Épargne et de Retraite, an institution conducted by the Belgian Post Office authorities.<sup>2</sup>

Again, at the end of September 1914 a raid was made on the banks in Brussels, on account of the annoyance of Field-Marshal Von der Goltz at the refusal of the city to pay the balance of an enormous contribution imposed upon it. It was decided to place all the financial houses under German control. Foreign bankers were forbidden to pay any further cheques, and the local banks were prohibited from transacting any further business. No cheque was allowed to be paid without the special order of the German authorities.<sup>3</sup> These proceedings are scarcely in accordance with the requirements of the Hague Regulations, providing for the maintenance of the "vie publique" of occupied territory.

(d) Next, as to pillage. And in this respect the conduct we have to refer to showed not only greater sordidness, vulgarity, avarice, brutality, and furious vindictiveness; it showed also a signal disregard of law that was established long before the States of the world meeting in conference formally put their seals to it. In all wars, even those that have been regularly and humanely conducted—that is, so far as regularity and humaneness are possible in war at all—invaders and occupants of the enemy territory have

<sup>1</sup> Cf. P. Schiemann, *Rechtslage der öffentlichen Banken im Kriegs-falle* (Greifswald, 1902), p. 76. (Cited by the Belgian Commission.)

<sup>2</sup> *The Case of Belgium*, pp. 17, 18.

<sup>3</sup> *The Times*, October 2, p. 8.

been charged with looting. But the wholesale pillage and rapine to which in the present war the German troops abandoned themselves so heartlessly, so unconscionably, and so systematically withal, must ever be remembered as a black stain on an army that prided itself on its country's high civilization. Was all this conduct a significant manifestation of what Professor Eucken, one of the most discerning of present-day philosophical writers of Germany, stigmatized before the outbreak of the war as the "soullessness" of modern German culture?

But these methods, which are so strikingly reminiscent of the doings of Tilly and his hordes, were not specially invented by the German soldiers in this war. We find them in the Franco-German War of 1870-1, when the grandfathers of the modern warriors looked upon their belligerent enterprise as a source of personal profit. And even with regard to their earlier progenitors, let us call Froissart to witness, who in the middle of the fourteenth century writes thus: "*Allemands de nature sont rudes et de grossier entendement, si ce n'est à prendre leur profit, mais à ce sont-ils assez experts et habiles; item, moult convoiteux et plus que nulles autres gens, oncques ne tenant rien de choses qu'ils eussent promis; telles gens valent pis que Sarrazins ni païens.*" However, whatever their earlier proclivities and practices were, there is no doubt that in 1870, as in 1914, the subtleties and ambiguous reservations of their military code rendered rapine possible. And frequently there was little to distinguish pillage from theft. What could not be carried off was destroyed. The places adjacent to the field of battle were systematically plundered after the conflict. A telegram (November 4, 1870) from the commander of the Bordeaux division to the Minister of War said: "The Bavarian prisoners who have reached Oleron have in their possession a considerable amount of money in French gold, watch-chains, and a large quantity of women's jewels." On the persons of two Germans killed at Gravelotte was found no less a sum than 40,000 fr. in securities. Officers also took part in the scramble. In the pockets of a

fallen Silesian captain were found various articles, together with a note-book which recorded his acquisitions from a certain mansion, "some cashmere and several diamond rings for my fiancée."<sup>1</sup> In captured ammunition wagons were found an extraordinary collection of lace, shawls, silk dresses, clocks, sunshades, mirrors, billiard-balls, curtains, children's linen, women's dresses, saddlery, silver-ware, watches, etc. Dépôts were established for despatching plunder to Germany. A major who presided over this function at a railway-station near Paris was locally known as the "chef des brigands." In General Chanzy's order of the day (December 15, 1870), the invaders were truly described as "des hordes de dévastateurs."<sup>2</sup>

Let us now present some examples of the pillaging exploits in the present war; there is no need to give more than a few by way of illustration, for we cannot follow everywhere in the footsteps of the invaders and mention every case of depredation—we have not enough room here for such a task.

A Belgian nobleman gave an account of proceedings that took place during the sack of Louvain. He said that as the troops were looting the houses that yet remained undestroyed, the Burgomaster requested their commanding officer, Major von Manteuffel, to put a stop to the misconduct. Accordingly a proclamation was issued to the effect that henceforth no more looting would be allowed, whence it appears that till then the practice was officially countenanced. When the Landsturm troops passed through the town a few days later pillaging recommenced. Once more the Burgomaster protested. The answer given to him was that the new soldiers had not had time to read the proclamation, and for three days more no measures were taken to stop them. "I saw with my own eyes soldiers filling up carts with the furniture and personal belongings of the former inhabitants, which were then sent to the station and conveyed to Germany." The

<sup>1</sup> D. de Lonlay, *Français et Allemands*, vol. i. p. 227.

<sup>2</sup> Cf. P. Gigout, and A. Brenet, previously referred to.

same narrator said that nearly all the houses of his village, near Louvain, that had been abandoned by their inmates, were searched and looted. Linen, wine, tobacco, plate, clothing were taken. "I personally collected from the bodies of dead Belgian soldiers various small mementoes, papers, and sums of money, and carefully noted and put them aside in order that I might give them back to the families concerned. All these little objects have been deliberately stolen from the place I had put them in by the German soldiers."<sup>1</sup>

In the case of Aerschot, the Belgian Commissioners stated that for three weeks, beginning on August 19th, "the soldiers gradually plundered almost all the houses, destroying everywhere the objects which failed to satisfy their greed, while the officers kept for themselves the houses of the wealthy. All the valuables which the owner had not had time to put in safety, plate, family jewels, and money, have disappeared, and the people declare that the fires had often no other object than to hide the traces of some particularly important theft. Full wagon loads of booty left Aerschot in the direction of the Meuse."<sup>2</sup>

At Termonde there were similar practices. Some days before the destruction of the Hôtel de Ville (which took place September 19), the building was ransacked; every drawer was searched, the safe was forced open, and cash-boxes were emptied.<sup>3</sup>

During the occupation of Péronne, August 27–September 14, the Germans not only constantly requisitioned provisions in an arbitrary manner, but they searched and looted all houses and shops, and despatched to Germany trains filled with furniture and other property taken from empty houses.<sup>4</sup> Soldiers broke into the wine-cellars, and mad scenes of drunkenness occurred.<sup>5</sup>

<sup>1</sup> *The Times*, September 26, 1914, p. 6.

<sup>2</sup> Fourth Report of the Belgian Commission, published in the press October 5, 1914.

<sup>3</sup> *The Times*, September 15, p. 12.

<sup>4</sup> *Ibid.*, September 28, p. 8.

<sup>5</sup> *Ibid.*, September 30, p. 7.

Several small towns and villages north of Paris were pillaged—for example, Senlis, Creil, Crépy.<sup>1</sup> A large number of villages in several departments suffered heavily—for example, in the department of the Marne, the communes of Heiltz-le-Maurupt, Suippes, Marfaux, Fromentières, Esternay.<sup>2</sup>

During the occupation of Châlons, says a report drawn up by M. Léon Bourgeois, Senator for the Marne, all the big shops were rifled, jewellers' shops were robbed by officers, and the wine-cellars were emptied. When the French re-entered the town many German officers and soldiers were found lying drunk.<sup>3</sup>

About seven kilometres from La Ferté Gaucher, a mansion, deserted by the owners, was found with its doors and windows open and its contents pillaged. "The dining-room table," says an observer, "was heaped with the wreckage of a drunken meal. There were empty wine-bottles everywhere. . . . Every drawer from sideboard and cupboard lay on the floor, where its contents had been turned out in a search for all that was valuable. I passed from room to room, and everywhere found the same litter. It seemed that not a single wardrobe or press in the house had not been rifled. The beds were overturned, the telephone was smashed, and even a pile of gramophone records had been trodden under the German heel." How thoroughly the German troops carried out their search for plunder is shown in an instance mentioned by the same observer. At Chailly he entered a cottage and found there a woman over 70 years of age. "I have only one piece of bread," she said, "and when that is done, I suppose that I shall have to die. I had ninety francs in that box, but the Germans found it and took it. Now I have nothing left in the world but these few bits of furniture. . . ." <sup>4</sup>

When Valenciennes fell into the hands of the invaders

<sup>1</sup> *The Times*, September 18, p. 8.

<sup>2</sup> Report of the French Commission, *Journal Officiel*, January 8, 1915, p. 120.

<sup>3</sup> *The Times*, September 18, p. 8.

<sup>4</sup> *Ibid.*, September 18, p. 8.



they made a systematic inspection of all the houses in the town, and having first made a careful inventory of the furniture and the contents of wine-cellars, they then collected and sent everything of value to Germany. Special trains were used for the purpose. Little more than bread remained to the inhabitants of the town.<sup>1</sup>

The pitiless, arbitrary, and anarchical proceedings of the German soldiers were so dreadful that they called forth here and there the protests from some of their own men. An interesting and valuable document was furnished by a diary found on a fallen German officer. Under date August 17 the following entry was made: ". . . Our men had behaved like regular Vandals. They had looted the cellar first and then had turned their attention to the bedrooms, and thrown things about all over the place. They had even made fruitless efforts to smash the safe open. Everything was topsy-turvy. Magnificent furniture, silk, and even china. This is what happens when the men are allowed to requisition for themselves. I am sure they must have taken away a heap of useless stuff simply for the pleasure of looting." Things that could not conveniently be taken away were damaged or destroyed. Thus, in the same diary, under date September 3, at Rethel, we read: "The houses are charming inside. The middle-class in France has magnificent furniture. We found stylish pieces everywhere, and beautiful silk, but in what a state! . . . Good God! . . . Every bit of furniture broken, mirrors smashed. The Vandals themselves could not have done more damage. This place is a disgrace to our army. . . . The column commanders are responsible for the greater part of the damage, as they could have prevented the looting and destruction. The damage amounts to millions of marks. Even the safes have been attacked. In a solicitor's house in which, as luck would have it, everything was in excellent taste, including a collection of old lace and Eastern works of art, everything was smashed to bits. I couldn't resist taking a little memento myself here and there. . . ."<sup>2</sup>

<sup>1</sup> *The Times*, December 16, p. 7.

<sup>2</sup> *Ibid.*, October 19, p. 6.

(e) Now we come to the question of requisitions and contributions. In the Franco-German War enormous contributions were imposed, far exceeding the fiscal resources of the localities concerned; forced loans and exorbitant fines were exacted. A system of deliberately organized spoliation was put into practice. The Department of the Aisne alone was compelled to pay 33½ million francs in contributions. The insatiable thirst for contributions continued throughout the whole duration of the war, even during the days following the ratification of the preliminaries of peace. In the case of requisitions, too, there were constant abuses. Articles of luxury were compelled to be brought. Illegible worthless receipts were given. The demands were frequently as arbitrary and vexatious as they were grotesque. Arrogant behaviour and threats often accompanied the requisition of commodities. Thus, to give but one example :—

“The commune of Ormoy-la-Rivière must by seven o'clock to-morrow morning at the latest furnish three casks of wine ‘recommended’ to-day by the undersigned, failing which a commando will settle your village in the way it deserves.

“ PAULIN, *Lieutenant.*”<sup>1</sup>

In the present war we find a similar condition of things. During the occupation of Louvain (as was related by the treasurer of the city), the German general and his staff held an interview with the Burgomaster, the councillors, and the city treasurer. These conditions were agreed to: the town should fully provide for the invaders, in consideration of which no war contribution would be imposed; the soldiers not billeted in private houses were to pay in cash for all goods obtained, and they were not to molest the inhabitants under any circumstances. These stipulations were scrupulously observed by the Belgians, but disregarded

<sup>1</sup> Cf. J. Guelle, *Précis des lois de la guerre*, 2 vols. (Paris, 1894), vol. ii. appendix i.

by the Germans. For example, sometimes the Germans demanded as much as 67,000 lb. of meat, and then allowed 20,000 lb. of it to rot, whilst the population were suffering from hunger. About 10 o'clock in the evening of August 24, the Burgomaster, 62 years of age, who was then lying ill in bed, was made to get up and proceed to the railway-station, where he was called upon to furnish immediately 250 warm meals and 250 mattresses for the German soldiers, under penalty of being shot. "The inhabitants in their solicitude and pity for their aged chief gave their own beds and their last drops of wine." The Germans did not hesitate at any moment to brush aside their own undertaking. The troops forced their way into private houses, and took away from old and young alike whatever they fancied, paying for nothing, except with paper money to be presented to the "Caisse communale" (the municipal treasury) at the end of the war. The promise not to exact war contributions was likewise violated. As they did not find money enough in the treasury, the commanding officer ordered the immediate payment of 100,000 fr. This large sum not being procurable, he consented to accept 3,000 fr. to be paid the next day. Next morning, however, a demand for 5,000 fr. was made; but with much difficulty something over 3,000 fr. was collected which, after much hectoring, was accepted, and the threats that had been made were put off for a time.<sup>1</sup>

On September 3, at a small place like Crépy an enormous quantity of provisions was requisitioned, including flour, oats, dried vegetables, coffee, salt, wine, all smoked meats, ham, biscuits, as well as tobacco, cloth, new boots, stockings, shirts, braces, handkerchiefs, horseshoes, motor-cars, bicycles, petrol; for every day's delay in the delivery of these articles a fine of 100,000 fr. was threatened. The needs of the inhabitants were quite immaterial.

During the occupation of Ostend, the policy of the invaders was to commandeer all food and drink for their own use, and to leave the population to subsist as best

<sup>1</sup> *The Times*, September 8, p. 11.

they could. At one time, before relief came from abroad, some 20,000 people who remained in the town found themselves face to face with a famine. The occupying army demanded articles far beyond their actual needs. It was reported that goods of all kinds, from gold and silver objects to pianos, were commandeered without hesitation, and in many cases were despatched to Germany. A horse or a cow was paid for with receipts written in German; and when the bearer was able to find some one to translate them for him he discovered that he was to be repaid with "two kisses," or "two girls in Berlin."¹

It is no exaggeration to say that no other belligerent in the history of the whole world ever went to work so systematically and so arrogantly "to make war pay for war," to squeeze from municipalities and to wring from inhabitants all their resources, financial or in kind, to suck the very vitality from invaded or occupied territory, and to impose pecuniary penalties as excessive as they were harsh and iniquitous. The modern Germans have outdone the systematic extortion practised by their predecessors in 1870-1. Let us give a few examples of the war levies imposed on French and Belgian towns in the present war: Antwerp £20,000,000; Province of Brabant, £18,000,000; Brussels, £8,000,000; Liège, £2,000,000; Lille, £280,000; Wavre, £120,000; Valenciennes, £42,000; Roubaix and Tourcoing, £40,000; Amiens, £40,000; Lens, £28,000; Armentières, £20,000; and so on.

When M. Max, the Burgomaster of Brussels, protested that he could not procure the excessive war contribution, the wealthiest inhabitants and other leading citizens of the city were, by order of the German military governor, seized as hostages, and pressure was brought to bear on them personally. Threats were also made that the valuable works of art in the galleries and the collections of museums would be seized. It appears that afterwards the sum demanded from the city was considerably reduced; but the Burgomaster still protesting that he could not find

¹ *The Times*, November 24, p. 7.

more than 4½ million francs, the German general, Field-Marshal von der Goltz, replied: "That being so, we will take whatever we want without payment, and in future we will issue no receipts." M. Max at once retorted: "In that case you shall not have the 4½ million francs." An hour later he was arrested, and afterwards sent to a fortress in Germany. Then was begun the financial raid on the city, to which we have already referred.<sup>1</sup>

On August 22 General von Bülow imposed on the town of Wavre a war levy of £120,000 which was to be paid by September 1. In a letter of August 27 to the Burgomaster, Lieutenant-General von Nieber recalled this fact, and demanded the payment of £80,000 in gold, and a declaration that the balance would be paid without fail on September 1. The letter concluded with the threat: "The town of Wavre will be set on fire and destroyed, if the payment is not made when due; without distinction of persons, the innocent will suffer with the guilty."<sup>2</sup>

(f) In the war of 1870-1 the Germans habitually seized hostages. In earlier times hostages were given or exchanged as a guarantee that a promise or a treaty would be observed. In the war of half a century ago and in the war of to-day, mayors, councillors, university professors, priests, and other leading citizens were repeatedly arrested and held in oppressive and humiliating confinement. They were to be put to death, if their fellow-citizens did any of the numerous things that did not commend themselves to the invaders; they were likewise to be put to death if the population failed to do any of the numerous things required of them. Such means of intimidation and repression contributed more to the vaunted victory of the invaders than did superiority in the field. And the proceedings of 1870-1 are frequently referred to as worthy precedents by the German modern authorities. Their idea appears to be that once the leading

<sup>1</sup> *The Times*, August 29, p. 7; October 2, p. 8.

<sup>2</sup> Sixth Report of the Belgian Commission, published in the press, December 9, 1914.

inhabitants are got rid of, the remaining population will be completely reduced to submission. Though there is no specific provision in the Hague Regulations, yet the seizure of hostages is an arbitrary, brutal proceeding, and is antagonistic to those fundamental principles of humanity, conscience, fairness, and justice that are frequently mentioned in the Hague Conventions, and were still more frequently emphasized during the deliberations of the delegates of all the civilized States of the world. In general, to arrest hostages and threaten them with death if their fellow-citizens do not pay sums demanded is a practice akin to that of body-snatching brigands and black-mailing marauders, who were thought by now to have become extinct. In particular, the taking of hostages in order to ensure the non-resistance and submission of the invaded people, who are entitled to rise *en masse* against the approaching enemy and to protect themselves and their property against lawless and unjustifiable interference, is an unlawful means of depriving an adversary of the rights of self-defence.

On August 19, no sooner did the Germans enter the ill-fated city of Louvain than they took as hostages the mayor, a senator, the Vice-Rector of the university, the Dean of the city, and magistrates and aldermen.<sup>1</sup>

At Namur, a proclamation signed by Von Bülow was posted up August 25, 1914. It was to this effect: "(1) The Belgian and French soldiers must be delivered as prisoners of war before 4 o'clock in front of the prison. Citizens who do not obey will be condemned to hard labour for life in Germany. A rigorous inspection of houses will commence at 4 o'clock. Every soldier found will be immediately shot. (2) Arms, powder, and dynamite must be given up at 4 o'clock. Penalty—being shot. Citizens who know of a store of the above must inform the Burgomaster, under pain of hard labour for life. (3) Every street will be occupied by a German guard, who will take ten hostages from each street, whom they will keep under

<sup>1</sup> *The Case of Belgium*, p. 40.

surveillance. If there is any rising in the street, the ten hostages will be shot."<sup>1</sup>

On September 4 Termonde was bombarded, entered, and plundered. The leading citizens were immediately seized as hostages and treated with indignity and brutality.<sup>2</sup>

A few days after Reims was occupied, a proclamation was issued (September 12) laying injunctions on the inhabitants, and announcing that about a hundred of the leading citizens and priests of the city had been seized, who would be hanged at the slightest attempt at disorder on the part of the population.<sup>3</sup>

At Tournai, September 23, the deputy mayor, a councillor, and a professor were arrested, and it was announced that they and all the citizens were answerable with their heads "for the public tranquillity and security, as well as the maintenance and protection of the railways, telegraphic, and telephonic communications."

On October 5 a notice signed by Von der Goltz was posted up in Brussels. It stated that on September 25 certain railway lines and telegraph wires were destroyed, and that the adjacent places were compelled to give hostages. It concluded, as usual, with the threat: "In future, the localities nearest to the place where similar acts occur will be punished without pity; it matters little if they are accomplices or not. For this purpose hostages have been taken from all localities near the railway line thus menaced, and at the first attempt to destroy the railway line, or the telephone or telegraph wires, they will be immediately shot."<sup>4</sup>

Very frequently the shooting of hostages was carried out, not during a combat when passions are at their fiercest, but long afterwards. Vengeance was thus systematically and in a cold-blooded manner visited on the harmless inhabitants of places at which the invaders had met unex-

<sup>1</sup> Sixth Report of the Belgian Commission.

<sup>2</sup> *The Times*, September 15, p. 12.

<sup>3</sup> *Ibid.*, September 18, p. 8.

<sup>4</sup> Sixth Report of the Belgian Commission.

pected resistance from the regular troops. In most cases no explanation was given to the victims as to the cause for which they were executed. There was no question of trial. There was merely an arbitrary selection from among a mass of innocent people, of whom some were chosen "to pay for the acts of the guilty."<sup>1</sup> Everywhere, at all times, for all acts and omissions—death, death, death! Whence comes this insatiable thirst for human blood? We had thought that vampires were but fictitious creatures, confined to the sphere of imagination.

There is no need to multiply examples of this practice. One more instance, however, may be mentioned that occurred in a different part of Europe. The Italian paper, the *Messaggero*, stated that Prince Hohenlohe, the Lord-Lieutenant of Trieste, had a list compiled of a thousand notable Triestine and Istrian Italians who were to be imprisoned immediately in case Italy declared war against Austria; and that a proclamation was prepared announcing that the slightest demonstration against the Government would be punished not only by the shooting of those responsible, but also by the hanging of hostages drawn from the list.<sup>2</sup> If this statement were true, we may say that the proceeding was not only incompatible with the requirements of international law; it was also a gratuitous affront to a neutral State.

We have already seen that the infliction of collective penalties for the acts of individuals is expressly forbidden by the Hague Regulations, and we have had examples of the violation of this international provision. Indeed, the imprisonment or execution of hostages is closely akin to the imposition of this kind of penalty, and it is just as illegitimate. To put to death innocent citizens simply because one or two of their maddened townsmen attacked the enemy is a vile and cowardly deed, which is repugnant to the juridical sense of civilized man.

<sup>1</sup> Report of a Commission charged to collect evidence from Belgian refugees in London; dated London, December 29, 1914.

<sup>2</sup> *The Times*, October 18, p. 7.



At Senlis, as the Germans entered the town a poacher shot one of the soldiers and wounded another. The German commander, therefore, seized the mayor and five other leading citizens, and forced them to kneel before the graves which had already been dug. After various requisitions had been made, the six citizens were taken to a neighbouring field and shot.<sup>1</sup>

For the death of one Uhlan within the boundary of Tournai, a collective penalty—this time a fine of £120,000—was imposed on the town, which was compelled to pay it.<sup>2</sup>

In Brussels Field-Marshal von der Goltz issued a proclamation to the effect that two Belgian civic guards having wounded two German civic guards, the culprits were condemned, one to five years', the other to two years' imprisonment, and a fine of £200,000 was inflicted on the city—in spite of the excessive burdens that had already been imposed on it. An American paper commenting on this incident observed that the exaction of such an enormous fine for a "police-court offence" was like "squeezing the last drop of blood from a corpse."<sup>3</sup>

We shall not be guilty of exaggeration if we say that no other belligerent in modern times has ever enforced with such unrestrained ruthlessness and frightfulness the pretensions and demands made against an adversary, and especially so against the civil population. No other army occupying enemy territory has ever elaborated and persistently and remorselessly applied such a far-fetched, factitious, brutal system of "war treason."

<sup>1</sup> *The Times*, September 18, p. 8.

<sup>2</sup> *Ibid.*, September 25, p. 7.

<sup>3</sup> *Ibid.*, November 7.

## CHAPTER XIV

### THE WOUNDED—PRISONERS OF WAR

(a) FROM the very earliest times it was an established custom of war that soldiers who were disabled by wounds or sickness should not be subjected to any kind of ill-treatment at the hands of the enemy. In course of time religious bodies voluntarily took upon themselves to tend the sick and wounded.

Conventions were also frequently entered into between two or more States in order to secure aid and protection to such of their soldiers as were disabled in war between the contracting parties. But it was not until the eighteenth century that belligerents themselves came to deem it an obligation on their part, irrespective of treaty stipulations, to look after the enemy's disabled men.

About the middle of the nineteenth century a movement was set on foot in several European countries, for the purpose of establishing an international medical and sanitary organization. At a semi-official Conference held at Geneva in 1863 it was proposed that every country should create aid societies, and that hospitals, together with their material and staff, should be neutralized and distinguished by means of some common emblem. The following year at the invitation of the Swiss Government a Congress of States met and produced the Geneva Convention, which came to be accepted by nearly all civilized states. It required belligerents to take all necessary measures to protect the sick and wounded regardless of their nationality, and to send them back to their own country when they

recovered and were unfit for further service. Hospital ambulances and their material and staff were made inviolable, if they were distinguished by the Red Cross. In 1868 a supplementary Convention was established applying these rules to maritime war. In course of time considerable emendations became necessary, and in 1899 the subject was considered at the Hague Conference. Finally, a largely improved Geneva Convention respecting land warfare was agreed to in 1906; and the tenth Convention of the second Hague Convention, 1907, was laid down for naval warfare.

For our present purpose we may direct our attention mainly to the Geneva Convention of 1906. Though not all the Powers of the world have signed and ratified it, there is no doubt that its fundamental principles have none the less universal applicability. Besides, the provisions of the Convention of 1864 still apply to such of its signatories as are not parties to the later Convention. There is no need here to state all the articles of the Convention of 1906; but in view of what we have to say later the following should be noted.

ARTICLE 1.—Officers and soldiers, and other persons officially attached to armies, shall be respected and taken care of when wounded or sick, by the belligerent in whose power they may be, without distinction of nationality. Nevertheless, a belligerent who is compelled to abandon sick or wounded to the enemy shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to contribute to the care of them.

ARTICLE 3.—After each engagement the commander in possession of the field shall take measures to search for the wounded, and to ensure protection against pillage and maltreatment, both for the wounded and for the dead. He shall arrange that a careful examination of the bodies is made before the dead are buried or cremated.

ARTICLE 6.—Mobile medical units (that is to say, those which are intended to accompany armies into the field) and the fixed establishments of the medical service shall be respected and protected by the belligerents.

ARTICLE 7.—The protection to which medical units and establishments are entitled ceases if they are made use of to commit acts harmful to the enemy.

ARTICLE 9.—The personnel engaged exclusively in the collection, transport, and treatment of the wounded and sick, as well as in the administration of medical units and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

ARTICLE 12.—The persons designated in Articles 9, 10, and 11 [including the personnel of voluntary Aid Societies and Societies of neutral countries] after they have fallen into the hands of the enemy, shall continue to carry on their duties under his direction. When their assistance is no longer indispensable they shall be sent back to their army or to their country at such time and by such route as may be compatible with military exigencies. They shall then take with them such effects, instruments, arms, and horses as are their private property.

ARTICLE 13.—The enemy shall secure to the persons mentioned in Article 9, while in his hands, the same allowances and the same pay as are granted to the persons holding the same rank in his own army.

Some of these principles have not been consistently observed by the Germans in the present war. Indeed, not only have they violated several articles of the Geneva Convention, but in doing so they have also committed atrocities which might well have been thought impossible in a modern war between civilized nations. Let us mention a few examples.

On August 12, after a conflict at Haelen, some German infantry found a wounded Belgian officer, Commandant Van Damme, lying on his back in a helpless condition. Article 1 of the Geneva Convention was evidently nothing to them; for they fired their revolvers into his mouth, and then murdered him in cold blood.<sup>1</sup>

<sup>1</sup> *The Case of Belgium*, p. 38.

On August 9, at Orsmael, another Belgian officer, Commandant Knappen, was seriously wounded. German soldiers picked him up, propped him up against a tree and shot him. They were not satisfied with the commission of deliberate murder—they actually hacked the dead body with their swords.<sup>1</sup> From time immemorial all peoples, even the most savage, have respected the dead bodies of their enemies. If any rule of the international law of war can be said to have been universally recognized and firmly established, surely it is the rule that forbids a belligerent to mutilate or subject to indignities a fallen foe. The thought of carrying enmity beyond the grave has ever been repugnant to people, modern and ancient alike. Odysseus prevailed on Agamemnon to respect the body of Ajax, who by his murderous design on the Atreidae, had deservedly incurred their resentment and that of the Greek army: "For the love of the gods, take not the heart to cast forth this man unburied so ruthlessly; and in no wise let violence prevail with thee to hate so utterly that thou shouldst trample justice under foot. To me also this man was once the worst foe in the army—from the day that I became master of the arms of Achilles; yet for all that he was such toward me, never would I requite him with indignity, or refuse to avow that, in all our Greek host which came to Troy, I have seen none who was his peer, save Achilles. It were not just, then, that he should suffer dishonour at thy hand; 'tis not he, 'tis the law of Heaven that thou wouldst hurt. When a brave man is dead, 'tis not right to do him scathe—no, not even if thou hate him."<sup>2</sup>

Between Impde and Wolverthem two wounded Belgian soldiers were lying near a burning house. Some German soldiers deliberately picked them up and threw them into the raging flames.<sup>3</sup>

<sup>1</sup> *The Case of Belgium*, p. 84.

<sup>2</sup> Sophocles, *Ajax*, 1332 *seq.* (Jebb's translation). Cf. the present writer's work, *International Law and Custom of Ancient Greece and Rome*, 2 vols. (London, 1911); vol. ii. pp. 275 *seq.*

<sup>3</sup> *The Case of Belgium*, p. 48.

At Orsmael, again, on August 10, a Belgian quartermaster of the 3rd Lancers was wounded. One German soldier took his carbine and gave him a blow on the ribs with it. Another fired on him from a distance of six feet.<sup>1</sup>

During the night of August 15 some French soldiers were wounded at Dinant. The following day they were found with their skulls battered in by blows with clubbed rifles.<sup>2</sup>

On August 25 at Hofstade, near Malines, a Belgian rifleman, having been slightly wounded, was finished off with blows from butts of rifles which broke his skull. Eighteen soldiers of the same corps were bayoneted to death after being wounded.<sup>3</sup>

A war correspondent of the *Tyd* gives an account, under date October 14, Maestricht, of the ill-treatment of British wounded who were taken prisoners. He says that in one of the carriages of a train lay three severely wounded English soldiers between some wounded French. They had had no food for some days, and were brutally abused by a large number of German soldiers, some of whom laughed at them and found sport in their helplessness. The correspondent thereupon appealed to the under-officer, who was looking on and laughing. But the latter's reply consisted of foul epithets directed against the wounded men. The correspondent adds that German soldiers had told him in the train that they simply killed English prisoners—some of whom, no doubt, had been wounded. One man told him that twenty-six captured soldiers had been put to death by his company.<sup>4</sup>

This testimony appears to have been confirmed by a wounded member of the Royal Army Medical Corps who was taken to Netley Hospital. He said: "The Germans are taking no prisoners. I have seen them shoot the wounded as they lay writhing on the ground or attempting to rise. They seem to have almost as little regard for their

<sup>1</sup> Seventh Report of the Belgian Commission of Inquiry, published in the press January 1, 1916.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *The Times*, October 19, p. 7.

own wounded, and they use the wounded and the dead as cover for their troops." <sup>1</sup>

Further, the Belgian Commissioners of Inquiry have recorded that in several places, notably at Hollogne-sur-Geer, Barchon, Pontisse, Haelen, Zelk, German troops fired on doctors, nurses, ambulances, and ambulance wagons. <sup>2</sup>

At Aerschot, August 19-21, "ambulance attendants, though wearing the Red Cross arm-bands, were not respected. German troops fired on one while he was collecting the wounded, and continued to fire even though he showed the Red Cross arm-band. During the 19th, while engaged in hospital service, he was threatened and ill-used. A German officer, among others, took him by the head, thrusting the butt of a revolver against his forehead. A wagon driver, the son of the local tax-collector, wearing the insignia of the Red Cross, was killed in the rue de l'Hôpital, on the evening of August 19." <sup>3</sup>

During the sack of Louvain, a lady (the wife of a commandant in the 5th Belgian Artillery) who was engaged as a Red Cross nurse, and possessed the necessary badges, was ill-treated and often singled out for particular indignities. <sup>4</sup>

Two nurses who returned to Petrograd on September 24 related their experiences with General Samsonoff's army. On the night of August 29, they said, the Germans surrounded a field near Willenberg in which the nurses with a field divisional hospital had camped. All were made prisoners; they were dispossessed of their baggage, and were taken to Willenberg, where the nurses attended for eleven days to German and Russian wounded. <sup>5</sup> It will be remembered that Article 12 protects the private property of those engaged in Red Cross work.

Early in September 1914, it was reported that two British Red Cross surgeons were captured by the Germans and kept as prisoners; and no communication was made as to their whereabouts. <sup>6</sup>

<sup>1</sup> *The Times*, August 30, p. 2.

<sup>2</sup> *Ibid.*, p. 87.

<sup>3</sup> *Ibid.*, September 26, p. 7.

<sup>4</sup> *The Case of Belgium*, p. 84.

<sup>5</sup> *The Times*, September 22, p. 7.

<sup>6</sup> *Ibid.*, September 11, p. 7.

As to firing on hospitals flying the Red Cross, we have already had several examples in the preceding chapters. On August 23, too, at Namur, two Belgian and two French wounded soldiers were killed in a private hospital, which the Germans fired.<sup>1</sup>

A wounded member of the Royal Army Medical Corps, who was taken to Netley Hospital, said: "Our section consisted of 108 men. Only six are uninjured. The Germans made no distinction between combatants and non-combatants. They fired upon the Red Cross as upon soldiers in arms. They blew up three hospitals. One was established in a church. I had left it for a moment, and when I looked round a shell had blown off the roof of it. The R.A.M.C.'s losses are very heavy."<sup>2</sup>

In concluding this portion of the chapter, we may refer briefly to the Hague Convention of 1907 for the adaptation of the principles of the Geneva Convention to maritime war. Article 1 says: Military hospital ships, that is to say, ships constructed or adapted by States specially and solely with the view of aiding the sick, wounded, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last. Another Article lays down that these ships must not be used for any military purpose.

On October 19 the German steamer *Ophelia*, belonging to Hamburg, was brought into Yarmouth Roads by a British cruiser from the North Sea for examination. She was flying the Red Cross flag, and when boarded was found to have a wireless installation, which was dismantled, and to be fitted up as a hospital ship. According to Article 8 of the Convention the presence of wireless telegraphy apparatus on board is not in itself a sufficient reason for withdrawing protection; though if such ships engage in any acts harmful to the enemy their inviolability ceases. The vessel in

<sup>1</sup> Seventh Report of the Belgian Commission.

<sup>2</sup> *The Times*, August 30, p. 2.



question was detained, however, because her name had not been communicated to His Majesty's Government conformably to Article 1, and because at the time she was encountered she was behaving in a manner inconsistent with the duties of a hospital ship.<sup>1</sup>

On February 1, 1915, a more serious breach of international law was committed. A German submarine discharged a torpedo at the British hospital ship *Asturias*, 15 miles off the Havre lightship, but missed her. A similar attack was made on the hospital ship, *St. Andrew*. We have already pointed out instances of the bombarding of hospitals and the firing at ambulances; but the attack on a hospital ship is of a still more reprehensible character, as it occupies a more isolated and prominent position. Moreover, the *Asturias* and the *St. Andrew* had fulfilled all the requirements of the Convention; they were painted white with a horizontal band of green and a red cross, and they flew the Red Cross flag. Vessels of this kind are clearly recognizable by night as well as by day.

Some observations have already been made and examples given as to the treatment of prisoners of war. Now we have to treat the subject more systematically, with reference to the provisions contained in the Hague Convention of 1907.

ARTICLE 4.—Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5.—Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they may be confined only as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6.—The State may utilize the labour of prisoners of war, other than officers, according to their rank and aptitude. Their tasks shall not be excessive, and shall have

<sup>1</sup> *The Times*, October 20, p. 5.

no connection with the operations of the war. Prisoners may be authorized to work for the public service, for private persons, or on their own account. Work done for the State is paid at the rate in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed. When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities. The earnings of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

ARTICLE 7.—The Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE 8.—Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary. Escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.

ARTICLE 9.—Every prisoner of war, if questioned, is bound to give his true name and rank, and if he infringes this rule he is liable to have the advantages given to prisoners of his class curtailed.

ARTICLE 10.—Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and in such cases they are bound on their personal honour scrupulously to fulfill, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted. In such cases their

own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

The remaining Articles (11 to 20) on the subject (which may be more briefly referred to) make provision with regard to forced parole, breach of parole, the status of authorized army followers, the establishment of an Information Bureau relative to prisoners, the position of relief societies, freedom of postage, the payment of officers taken prisoners, freedom of religious worship, the drawing up of wills, death certificates, etc., and, finally, the repatriation of prisoners.

From the tenour of the above regulations we see that prisoners of war have been placed in a very favourable position by modern international law. In early days they were liable to be put to death or to be reduced to slavery. Later the practice of ransom grew up, which captors used as a source of enrichment. Chivalry and the Church introduced mitigations. From the seventeenth century prisoners began to be looked upon as being in the power of the belligerent State, and not, as before, in that of the individual soldier who captured them. And with successive ameliorations they have become, at least theoretically, "the spoilt children of the international law of war." It appears that in the present war the obligations which the Hague rules have imposed on belligerents were at first, with certain striking exceptions relating chiefly to the conduct in the field, satisfactorily observed.<sup>1</sup> First, let us look at some of these exceptions, and then we shall see how the provisions for internment have been applied.

The Belgian Commissioners related that on August 10, near Orsmael and Neerhespen, a Belgian soldier belonging to a battalion of cyclist carbineers was wounded and made prisoner; he was subsequently hanged. Another who was tending his comrade was fastened to a telegraph pole on the St. Trond road and shot.<sup>2</sup>

On August 6 several Belgian soldiers having been made

<sup>1</sup> Later, there were several reports of shocking ill-treatment of British prisoners.

<sup>2</sup> *The Case of Belgium*, p. 88.

prisoners by the Germans were carried off, with their hands bound behind their backs. At Saive they found themselves face to face with a company of the Belgian 19th of the Line. Thereupon the captors placed their helpless prisoners in front, and at a certain moment ordered them to cry out, "Belgians, do not fire, you are shooting at Belgians!" Two of the prisoners fell, shot down by the bullets of their comrades.<sup>1</sup> (We may here recall that in the South African War a Boer commandant was tried, December 1901, for certain offences, of which one was described as "a barbarous act contrary to the customs of war—placing prisoners in the firing line." He was found guilty and the death penalty was inflicted.<sup>2</sup>)

During the operations near Aerschot, August 18, 28 Belgian prisoners were brought by road along the River Demer, where two German companies were placed. All the prisoners were driven up before them and shot. Some, trying to evade the bullets, jumped into the river; but they were shot as they struggled in the water. Of the 28 prisoners only two survived, one of whom gave evidence before the Belgian Commission of Inquiry. "At the first firing," says the statement of the Commission, "the witness threw himself on the ground simulating death. A German soldier came close to him, and, noticing that he was alive, prepared to shoot him. An officer interfered, saying that the man was not worth the bullet, and ordered him to be thrown into the Demer. The witness succeeded in getting hold of the branches of a bush on the bank. Steadying himself on the stones at the bottom of the river, he spent the whole night in the water, his head only emerging."<sup>3</sup>

It was reported from Paris, August 29, that a well-known music-hall artist, who had distinguished himself as a non-commissioned officer in the Belgian army, was captured in a reconnaissance, by a patrol of Uhlans. They made sport

<sup>1</sup> Seventh Report of the Belgian Commission.

<sup>2</sup> Cf. *Papers relating to Martial Law in South Africa* (Cd. 981, 1902), pp. 271-2, 290.

<sup>3</sup> Fifth Report of the Belgian Commission, published in the press October 12, 1914.

of him ; they stripped him of clothing, and made him dance by pricking him with needles ; for his food they gave him but the scanty remains of their meals.<sup>1</sup>

During the battle of the Aisne the Germans, it was alleged, attempted to approach the British lines by forcing prisoners to march in front of them. The same device appears to have been more frequently adopted against the French. A French commander in a report says, after stating the date and place : " During a recent night attack the Germans drove a column of French prisoners in front of them. This action is to be brought to the notice of all our troops (1) in order to put them on their guard against such a dastardly ruse, (2) in order that every soldier may know how the Germans treat their prisoners." <sup>2</sup>

One of the later reports of the Belgian Commission states that both wounded soldiers and prisoners on their way to Germany were frequently deprived of food and the most elementary assistance. English prisoners seem to have fared the worst—and, we may add, not only in this case, but in general. On September 18 a striking instance of this ill-treatment occurred ; and witnesses testified that such incidents took place frequently.<sup>3</sup> Several later reports confirmed this testimony.

A private of the 5th Dragoon Guards, who was laid up with both feet frostbitten in a hospital at Broadstairs, dictated the following letter to the founder of the hospital, December 21 : " . . . I was taken prisoner at 7 o'clock in the morning on November 25, together with seven others, east of Ypres. The snow was thick on the ground, and the wind bitterly cold. At 9 o'clock the Germans stripped us of all our clothes, with the solitary exception of one thin shirt, and marched us out into an open field in charge of two sentries. At night I, with four others, escaped. We were fifteen hours without boots or any kind of clothing except the one shirt." <sup>4</sup>

<sup>1</sup> *The Times*, August 31, p. 7.

<sup>2</sup> *Ibid.*, September 25, p. 8.

<sup>3</sup> Seventh Report of the Belgian Commission.

<sup>4</sup> *The Times*, December 24, p. 9.

A British officer, however, in a letter to *The Times*,<sup>1</sup> thought the preceding an isolated case. He said that he had been a wounded prisoner, but was afterwards released, as the building in which he was, was captured by the British. He was treated with every consideration. The Germans shared their food with him, made him comfortable, and dressed his wounds with the greatest care. He talked with German wounded, and learnt from them that their papers had published dreadful tales of the British treatment of prisoners, which he was able to refute.

One case may be mentioned that occurred in a different field of operations. A German official announcement from Halle, September 18, stated that the Russian general, Martos, taken prisoner in East Prussia, was brought in chains to be tried, by court-martial, on a charge of burning villages and shooting the male inhabitants. This allegation at once called forth a denial from the Headquarters Staff, Petrograd, September 20. However, it was soon afterwards admitted by the *Vossische Zeitung* that no proof of atrocities was established against the general—and yet, without any inquiry, he was treated like a dangerous criminal and subjected to gross humiliation.<sup>2</sup>

Before concluding the consideration of the German treatment of prisoners of war on the field, we must refer to an original document which shows that sometimes orders were given to German troops to put to death those who were taken prisoners. On February 3 *The Times* referred to a diary kept by a German soldier of the 112th Infantry Regiment, and gave a photographic reproduction of the entry, under date August 21, which was to this effect: "There also came a Brigade Order that all French, whether wounded or not, who fell into our hands should be shot. No prisoners were to be made."

In accordance with the requirements of the Hague Convention, Bureaus of Information relative to prisoners were with greater or lesser delay set up in the various belligerent countries. On September 18 His Majesty's Government

<sup>1</sup> *The Times*, December 30, p. 9.

<sup>2</sup> *Ibid.*, September 21, p. 7.

received information that the German Government were prepared to communicate lists of British prisoners of war who were in their hands, in return for similar information as to German prisoners of war interned in this country. Such lists, containing particulars as to the physical condition of the prisoners, were intended to be exchanged periodically. Arrangements were also made for the transmission to Germany of letters, post cards, and postal parcels directed to British prisoners of war, and for the issue of money-orders without charge for commission, as well as for the free registration and insurance of postal parcels. Similar facilities were in return granted by Germany and Austria-Hungary.

The question of the employment of prisoners of war has in many places presented itself as a difficult problem. In the case of those taken by Russia, it was announced that they were put to various kinds of out-of-door labour, for example, working on railways, making roads, building houses, planting trees, felling timber, ploughing and helping with the harvest, constructing drainage works, etc. Efforts were made to avoid interference with the wages of regular workpeople. The attitude of the Russian Government with regard to this mass of foreign labour is indicated in the statement made by the Minister for Agriculture: ". . . Prisoners, in order to ensure their existence, must, of course, do the work which they are given. We will pay for this work, but our position with regard to them is not that of employers, as we have taken them with arms in their hands. They must work for us, and in return we will support and feed them honestly."<sup>1</sup>

As to the conditions of internment obtaining in Germany and in this country, we may refer to reports presented by officials of the American Embassy in London after their personal visits of inspection (in October) to the respective camps. In Germany, the military camp at Döberitz, situated in the outskirts of Berlin, was inspected. There were 9,000 prisoners of war, of whom 4,000 were British, 4,000

<sup>1</sup> *The Times*, September 17, p. 7.

Russians, and the remainder Belgians and French. They were all then in tents, but were about to be removed to a new camp of frame buildings. The report described the allotted buildings as excellent, and all the other arrangements as praiseworthy. The soldiers were engaged in manual labour, and appeared to be contented. They were treated by their guards with due consideration. The rations served out to them were of the same kind as the usual rations of the German army.<sup>1</sup>

At first the reports as to the treatment of British prisoners of war in Germany were on the whole satisfactory. But it appears that afterwards the authorities there adopted rigorous measures, in contravention of the Hague Regulations and the principle of humanity. In the course of correspondence (published March 17, 1915) between Sir Edward Grey and the American Ambassador in London, with regard to British reprisals against Germany on account of the illegitimate and outrageous conduct of her submarines,<sup>2</sup> the Foreign Secretary observed: "We have from time to time received most terrible accounts of the barbarous treatment to which British officers and soldiers have been exposed after they have been taken prisoners, while being conveyed to German prison camps. One or two instances have already been given to the United States Government, founded upon authentic and first-hand evidence, which is beyond doubt. Some evidence has been received of the hardships to which British prisoners of war are subjected in the prison camps, contrasting, we believe, most unfavourably with the treatment of German prisoners in this country." It was proposed to Germany to agree to regular inspection of her military camps by officials of the United States; but she refused to entertain the proposal. Sir Edward Grey concluded: "We remain in continuing anxiety and apprehension as to the treatment of British prisoners of war in Germany."<sup>3</sup>

The report as to the treatment of German and Austro-

<sup>1</sup> *The Times*, November 18, p. 7. •    <sup>2</sup> See *infra*, Chap. XX.

<sup>3</sup> Cf. the White Paper issued by the Foreign Office, April 9.



Hungarian prisoners interned in Great Britain bears the date, London, October 4, and was published in Germany in the *Cologne Gazette*. The camps at Frimley and Queensferry, and the camp for officers in Wales—as representative of the different kinds of camps in use—were visited. Frimley was described as an enclosed open-air camp, where the prisoners lived in tents; in the cold season, buildings would be used instead. At Queensferry there was a roofed-in camp, consisting of the empty buildings of a large disused factory; it was surrounded by a wooden palisade, which enclosed also an exercise ground, as well as places for cooking, washing, and sanitary necessities. Military and naval officers were kept in a spacious private mansion, and they were allowed to select their servants from among the other prisoners. The daily rations were satisfactory, both in quality and in amount; and there was an ample supply of cooking utensils and table outfit. Each camp had a canteen, where the scale of prices was settled by the commandant. In the roofed-in camps each prisoner received two blankets, a wooden bedstead, and a straw mattress. In the open-air camps each tent contained twelve inmates, who slept on sack beds placed on the wooden floors of the tents. The visiting officials stated in their report: "Most of the prisoners with whom we conversed made no complaint about the sleeping arrangements." They were permitted to buy with their own money whatever additional provisions they pleased. Outfits of clothing, etc., were given to all who needed them. There were facilities for washing linen, and for having baths. The sanitary and hospital arrangements were satisfactory. Most of the men were disposed to fill up their time with some employment, for which they received payment. German books were placed in each camp. Letters were regularly received and posted, after having been subjected to the censor. They were allowed to receive money that was sent to them. "No one complained of ill-treatment by the troops on guard or by the commandant. On the contrary, they were spoken of with appreciation and

are liked by the prisoners." The officers received half the pay of officers of corresponding rank in the British army. They could thus provide for their respective needs and pay their servants, who cooked for them and performed other household duties. No work of any kind was imposed on them. They could send and receive letters subject to the censorship. No complaint was made in regard to their treatment, though several complained that they ought not to have been detained, on the ground that they belonged to the Red Cross service or to the Army Medical Corps. All spoke of the commandant in terms of recognition.<sup>1</sup>

The prescribed treatment of prisoners of war is obviously conditional in the first place on the enemy's observance of the regulations in the case of prisoners taken from us, and secondly on the honourable belligerent conduct of the prisoners. Therefore, captured soldiers or sailors who have violated the laws of war are not entitled to be treated as prisoners of war; they are, on the contrary, liable to be tried by court martial as war criminals, and, if found guilty, they may be hanged, or shot, or sentenced to penal servitude according to the gravity of their offence. We have already referred to a number of German airmen, who fell into the hands of the Russians after they had dropped bombs on the open town of Libau, and were informed that on account of their illegitimate conduct they would be treated as common outlaws. Similarly a German prisoner taken by the French was proved to have committed outrages on French wounded and robbed fallen men, and therefore was shot as a criminal. .

On March 8, the Board of Admiralty issued the following statement: "Since the war began his Majesty's ships have on every occasion done their utmost to rescue from the sea German officers and men whose vessels have been sunk, and more than 1,000 have been saved, often in circumstances of difficulty and danger, although no such treatment has ever yet been shown to British sailors in similar distress. The officers and men thus taken prisoners have received the

<sup>1</sup> *The Times*, November 18, p. 6.

treatment appropriate to their rank and such courtesies as the service allows, and in the case of the *Emden* were accorded the honours of war.

"The Board of Admiralty do not, however, feel justified in extending honourable treatment to the 29 officers and men rescued from submarine U8. This vessel has been operating in the Straits of Dover and the English Channel during the last few weeks, and there is strong probability that she has been guilty of attacking and sinking unarmed merchantmen and firing torpedoes at ships carrying non-combatants, neutrals, and women. In particular, the s.s. *Oriole* is missing, and there is grave reason to fear she was sunk at the beginning of February with all hands—twenty.

"There is, of course, great difficulty in bringing home particular crimes to any individual German submarine, and it may be that the evidence necessary to establish a conviction will not be obtained until after the conclusion of peace. In the meantime, persons against whom such charges are pending must be the subject of special restriction and cannot be accorded the distinctions of their rank, or be allowed to mingle with other prisoners of war."

Leniency to captured combatants who have been proved guilty of inhuman or illegitimate conduct is undoubtedly a very bad policy. It is an injustice alike to our own forces and to international law. The prompt punishment of such offenders and the immediate notification thereof would operate as a deterrent in the case of many of those who would otherwise have readily committed similar misconduct. There are crimes in war as there are crimes in peace; none should be allowed to be perpetrated with impunity. It has been contended in some quarters that a combatant's acts, no matter how heinous, outrageous, and abominable, do not possess a criminal character if they are committed under orders from superior officers. But this argument carried to its logical conclusion would lead to ineptitude and absurdity; the successive shifting of responsibility would exculpate every one until we reached the

ultimate cause—in the case of Germany let us say, for example, the Kaiser. Can it, then, be seriously held that several millions of men may act contrary to law established, and perpetrate horrors and atrocities, and that they should be considered entirely guiltless on the ground that they carried out the admittedly illegitimate commands of their supreme authority? The safety and stability of a nation or of a family of nations are incompatible with such an exaggerated and preposterous notion of vicarious responsibility.

## CHAPTER XV

### BELLIGERENTS AND NEUTRALS—RIGHTS AND DUTIES OF NEUTRALITY—LOANS—BELLIGERENT VESSELS IN NEUTRAL PORTS AND CANALS

(a) ELSEWHERE the present writer has pointed out<sup>1</sup> that the conception of neutrality was not entirely unknown in ancient times, though, undoubtedly, there never was then uniform and systematic practice. The States of Hellas sometimes put into practice some of the fundamental principles involved in the conception, and their writers often use expressions signifying "keeping quiet," "being of neither party," "occupying an intermediate position," and the like. Roman writers speak of "medii," "amici," "pacati"; but neutrality was scarcely compatible with their State's policy which regarded another country either as an ally or as an enemy. In the Middle Ages a similar view obtained. As time went on maritime commerce developed, interstate relations increased, colonies were founded, efforts to promote peace were made by the Church, the objects of war became modified, and the notion of neutrality came to be more and more clearly defined. Treaties and conventions aided this progress. Early in the seventeenth century practice was yet unsettled; but by the following century the duty of a non-combatant State's impartiality, and the belligerents' respect of the latter's territory began to be more definitely recognized and insisted on—though it was still thought legitimate for a

<sup>1</sup> Cf. *The International Law and Custom of Ancient Greece and Rome* (London, 1911), vol. ii. pp. 801 *seq.*; Essay on Bynkershoek, in *Great Jurists of the World* (London, 1918), pp. 408 *seq.*

third State to furnish troops to a belligerent conformably to treaty obligations, and also for troops to be raised on neutral territory in general. A certain attempt to put into force something like a consistent doctrine was made—though unsuccessfully—in the case of the First Armed Neutrality formed by Russia in 1780; but it may be said that the essential principles of neutrality, conferring rights on the one hand and imposing obligations on the other, were first applied in practice by the United States during the Washington administration. Thus in regard to the conduct of the French envoy Genêt (to whom reference has already been made) Jefferson formulated in 1793 the obligations of neutral States: "That a neutral nation must, in all things relating to the war, observe and enact impartiality toward the parties; that favours to one to the prejudice of the other would impart a fraudulent neutrality, of which no nation would be the dupe; that no succour should be given to either unless stipulated by treaty, in men, arms, or anything else directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign Power or person can levy men within its territory without its consent; and he who does may be rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments."<sup>1</sup>

Then followed both in Great Britain and in the United States notable enactments imposing on their subjects certain important duties in respect of neutrality.

The present law of neutrality is founded partly on usage and partly on written law. The latter is contained in several Conventions of The Hague—more particularly the fifth Convention of 1907 dealing with the case of war on land, and the thirteenth dealing with maritime war—and in the Declaration of London, 1909. (The question of the

<sup>1</sup> J. B. Moore, *Digest of International Law*, vol. vii. pp. 880, 881.

applicability of the latter will be referred to later.) In summary form it may be said that the obligations thus laid on every neutral State are, firstly, to abstain from doing certain acts, for example, furnishing a belligerent with troops, war material, and any supplies calculated to aid him in prosecuting the war; secondly, to prevent others from doing within its territory anything intended for belligerent service, for example, enlisting men, making there a base of operations, despatching thence warships; thirdly, to acquiesce in certain belligerent acts that interfere with its subjects or their property, for example, searching merchantmen and seizing contraband. To these is to be added the general duty of impartiality, that is, all belligerents must be treated equally by the neutral State when it carries out its duties and exercises its discretionary powers. An important point to be borne in mind is the distinction between the acts of a neutral State and those of a neutral individual—for the latter may well do certain things which, if done by the former, might constitute a breach of neutrality.

It will be well to look now at some of the provisions of the neutrality Conventions, and consider relatively thereto certain incidents that occurred during the war. As to the rights and duties of neutral Powers, the fifth Convention lays down the following rules:—

ARTICLE 1.—The territory of neutral Powers is inviolable.

ARTICLE 2.—Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

ARTICLE 3.—Belligerents are likewise forbidden to (a) erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea; (b) use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE 4.—Corps of combatants cannot be formed nor

recruiting agencies opened on the territory of a neutral Power in the interest of the belligerents.

ARTICLE 5.—A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur in its territory.

ARTICLE 7.—A neutral Power is not bound to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything that can be of use to an army or fleet.

ARTICLE 8.—A neutral Power is not bound to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

ARTICLE 9.—Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents. A neutral Power must see that the same obligation is observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

Certain acts of neutral persons are not to be considered as hostile or unneutral: for example, the furnishing of supplies or the making of loans to one of the belligerents, provided that the person thus furnishing or lending lives neither in the territory of the other party nor in territory occupied by him, and that the supplies do not come from the territories (Article 18, which was not accepted by Great Britain).

The thirteenth Convention provides the following regulations:—

ARTICLE 1.—Belligerents are bound to respect the sovereign rights of neutral Powers, and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a breach of neutrality.

ARTICLE 2.—Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a breach of neutrality and is strictly forbidden.



ARTICLE 5.—Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries; and in particular they may not erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

ARTICLE 9.—A neutral Power must apply to the two belligerents impartially the conditions, restrictions, or prohibitions issued by it in regard to the admission into its ports, roadsteads, or territorial waters of belligerent warships or of their prizes. Nevertheless, a neutral Power may forbid any particular belligerent vessel, which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

ARTICLE 12.—In default of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

ARTICLE 13.—If a Power which has received notice of the outbreak of war learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local law.

ARTICLE 14.—A belligerent warship may not prolong its stay in a neutral port beyond the time permitted except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

ARTICLE 17.—In neutral ports and roadsteads belligerent warships may carry out only such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

ARTICLE 18.—Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

ARTICLE 19.—In neutral ports or roadsteads belligerent warships may only revictual to bring their supplies up to the peace standard. Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, however, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied. If in accordance with the law of the neutral Power the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

ARTICLE 20.—Belligerent warships which have taken fuel in a port belonging to a neutral Power may not replenish their supply in a port of the same Power within the succeeding three months.

These fundamental principles of neutrality were, in the present war, recognized and insisted on by most of the neutral Powers, and notably by the United States. Besides proclamations of neutrality issued by President Wilson, and an intimation that the Federal Government would look with disfavour upon loans made by Americans to any of the belligerents, he also issued a statement to the American people which was published in the daily press of the United States, and was posted up in 60,000 post-offices in five languages. In the course of this statement he observed: "Every man who really loves America will act and speak in the true spirit of neutrality, which is the spirit of impartiality and fairness and friendliness to all concerned." He referred to the fact that the population is drawn largely from the present belligerents; he recognized that the different sections of the people might have different sympathies; but he warned all "against that deepest, most subtle, most essential breach of neutrality which may spring out of partisanship, out of passionately taking sides."

"We must be impartial in thought," he declared, "as well as in action, must put a curb upon our sentiments as well as upon every transaction that might be construed as a preference of one party to the struggle before another."

When the Kaiser despatched a telegraphic message to President Wilson (September 7) alleging certain violations of international law on the part of the French (namely, the use of dum-dum bullets), the President, conformably to the above declaration, returned a reply which constitutes a noteworthy document:—

"I received your Imperial Majesty's important communication of the 7th, and have read it with gravest interest and concern. I am honoured that you should have turned to me for an impartial judgment as the representative of a people truly disinterested as respects the present war and truly desirous of knowing and accepting the truth.

"You will, I am sure, not expect me to say more. Presently, I pray God very soon, this war will be over. The day of accounting will then come, when I take it for granted the nations of Europe will assemble to determine a settlement. Where wrongs have been committed their consequences and the relative responsibility involved will be assessed.

"The nations of the world have fortunately by agreement made a plan for such a reckoning and settlement. What such a plan cannot compass, the opinion of mankind, the final arbiter of all such matters, will supply.

"It would be unwise, it would be premature, for a single Government, however fortunately separated from the present struggle, it would be even inconsistent with the neutral position of any nation, which like this has no part in the contest, to form or express a final judgment.

"I speak thus frankly because I know that you will expect and wish me to do as one friend should to another, and because I feel sure that such a reservation of judgment until the end of the war, when all its events and circumstances can be seen in their entirety and in their true

relation, will commend itself to you as a true expression of sincere neutrality.”<sup>1</sup>

Thus, the President interpreted the essential obligation of neutrality incumbent on his State as that of doing nothing, and not necessarily as that of doing something impartially. It is submitted, however, that if the present conflict had been proceeding regularly and legitimately, and no signal infractions of international law had been committed, the attitude thus adopted by the United States Government would have been perfectly proper. But having regard to the striking and flagrant violation of written law and long-established usage that Germany and her forces undoubtedly committed—her very first act being a defiance of solemn treaties and a crime against Belgium—it would by no means have been inconsistent with American neutrality to make strong protests to Germany and otherwise bring pressure to bear upon her. Indeed, seeing that the United States was a party to the violated Conventions, and therefore a guardian of international law, it was legally incumbent upon her to do everything possible to safeguard that law from further infringements.

An important point concerning American neutrality remains to be mentioned. We have just seen how extremely anxious the President was from the first that his country should preserve an impartial attitude, and how forcibly he appealed to his fellow-citizens to refrain from unneutral agitation. In contravention of this appeal, the German Ambassador in Washington associated himself with a number of persons—leaders of the Teutonic element—who continued to conduct a pro-German campaign in the United States. To such proceedings on the part of the German Ambassador exception was taken in many quarters there; his pronouncements on the significance of Japan's policy, made with the object of stirring up ill-feeling against the Allies, were especially resented. More than one newspaper advised him to bear in mind what happened to Genêt when

<sup>1</sup> Printed in the American papers, September 17; *The Times*, October 12, p. 3.

he tried to enlist the sympathy of the United States on the side of revolutionary France as against Great Britain. It will be remembered that Genêt, the newly-appointed French Minister, arrived in the United States in April, 1793. He at once made efforts to secure American sympathy for the French Republic, and even commissioned privateers and tried to obtain recruits. His proceedings obviously involved a violation of American neutrality. Accordingly, Jefferson, then Secretary of State, declared, in a communication to him, that it was "the duty of a neutral nation to prohibit such [acts] as would injure one of the warring Powers."<sup>1</sup> As Genêt continued his reprehensible activities, despite the American declaration, Washington demanded and secured his recall.

(b) It was pointed out above that certain acts done by a neutral State would be objectionable, whereas the same done by a neutral individual might be perfectly legitimate. A neutral Power must abstain from supplying instruments and munitions of war or giving or lending money to a belligerent; but it need not prevent its subjects from so doing. (Of course such commodities, specie and negotiable securities would, as contraband of war, be liable to capture by a combatant when on their way to an enemy destination.) A neutral Government is not bound to forbid its subjects to take stock in loans issued by a belligerent. However, States have sometimes construed their duties of neutrality so strictly that they have gone to the extent of prohibiting such transactions on the part of their subjects. For the transactions might, indeed, assume such enormous proportions that they would, in effect, be equivalent to aid furnished, not by a few individual persons, but by the whole country, by the very State itself. And to assent to or to tolerate the entering into such extensive transactions would virtually, if not nominally, make the State a party to them. Thus, about the middle of August 1914 the American State

<sup>1</sup> Jefferson to Genêt, June 5, 1793; quoted in Moore, *Digest of International Law*, vol. ii. § 224; vol. vii. § 1295.

Department announced that "loans by American bankers to any foreign nation which is at war are inconsistent with the true spirit of neutrality." This announcement called forth a great deal of controversy in America. Some critics thought that if it was intended to apply to such transactions as the Morgan French loan proposal—which was not a war loan in the ordinary sense of the term, but simply an arrangement to purchase foodstuffs for France on a credit to be established in the United States—then the Government's policy was to be condemned. Others asked whether, "if Dr. Wilson and Mr. Bryan hold that it is a violation of the true spirit of neutrality to lend a belligerent funds to buy foodstuffs, it is not equally a violation of that spirit to sell a belligerent foodstuffs." Further, the opinion was expressed that the position of the American Administration was incompatible with the modern theory of international law. Again, it was felt that the President and his Secretary of State were "betrayed by their benevolent idealism into taking a somewhat extreme attitude against loaning American credit in time of war"; and it was pointed out that food is needed for the civilian population of a belligerent as well as for the armed forces. Finally, this view was urged: "A national loan would be inadmissible, but to discourage loans by individuals while exerting the Government's utmost power to encourage the sale of our surplus products in belligerent markets is neither sound business, correct sentiment, nor true neutrality. It is statesmanship at cross-purposes."<sup>1</sup>

Whatever exceptions these critics may have taken to their Government's policy, the position from the point of view of international law is as we have stated above. A Government may interpret the provisions of neutrality more or less strictly as it deems fit in view of the special circumstances of each case, provided, of course, that its interpretation be not inconsistent with the injunctions of international law. If it chooses to remain neutral with the utmost particularity, and thereby prejudices the commercial

<sup>1</sup> Cf. the American reports in *The Times*, August 19, p. 5.

interests of its subjects, international law can have nothing to say—as the question is purely a domestic one concerning differences between the Government and the governed. At the Hague Conference of 1907, certain “pious wishes” were expressed, of which one was: “That in case of war the competent authorities, civil and military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more particularly of a commercial and industrial nature, between the inhabitants of the belligerent State and neutral countries.” But in certain circumstances incidental to an extraordinary war, a neutral Power may well deem it desirable, conformably to its conscientious attitude of neutrality, to impose limitations on certain kinds of commercial intercourse between its subjects and a belligerent country.

Several publicists<sup>1</sup> hold that loans made by neutral individuals to belligerents are, in many cases, illegal, and that their Government is bound to prohibit such transactions. But it is necessary to distinguish between ordinary loans made simply in the way of business, which might easily, considering the world's financial ramifications, evade the notice of the Government, and large public loans raised openly and freely which might well compromise the Government permitting them. One or two examples may be referred to. In 1842 citizens of the United States made advances to the Government of Texas, then recognized as independent, and, Mexico protesting, the Government of the United States observed that there was nothing unlawful in this, so long as Texas was at peace with the United States, and added that there were things which no Government undertakes to prevent.<sup>2</sup> In the Crimean War a

<sup>1</sup> For example, J. C. Bluntschli, *Das Moderne Völkerrecht* (1868), § 768; Sir R. Phillimore, *Commentaries upon International Law*, 4 vols. (London, 1877-89), vol. iii. 247; C. Calvo, *Le Droit International*, 6 vols. (Paris, 1898), § 1060; Gen. H. W. Halleck, *International Law*, 2 vols. (London, 1898), vol. ii. 168.

<sup>2</sup> Cf. H. Taylor, *Treatise on International Law* (Chicago, 1901), p. 675.

Russian loan was issued in Germany and Holland, in spite of the protest of France. In the Franco-German War a French loan and a German loan were issued in London. In the case of the Russo-Japanese War, 1904, Japan raised money in London and Berlin, and Russia in Paris and Berlin.

An opinion of great interest on the question of subscriptions and loans (in connection with the Greek War of Independence) was given by our Law Officers in 1823. The British Government submitted three questions to them, which, together with the answers returned, are as follows :—

(1) Whether subscriptions for the use of one of two belligerent States by individual subjects of a nation professing and maintaining a strict neutrality between them were contrary to the law of nations, and constituted such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral Government? Answer: Such subscriptions would be inconsistent with the neutrality and contrary to the law of nations; but the other belligerent could not regard them as an act of hostility, though they might afford just ground of complaint if carried to any considerable extent.

(2) Whether—assuming that such individual voluntary subscriptions in favour of one belligerent would give just cause of offence to the other—loans for the same purpose would give the like cause of offence? Answer: Loans, if entered into merely with commercial views, would not, according to prevailing opinion and practice, be a breach of neutrality.

(3) And, if not, where the line should be drawn between a loan at an easy or mere nominal rate of interest or with a previous understanding that interest would never be exacted and a gratuitous voluntary subscription? Answer: Gratuitous contributions offered, under colour of a loan, without or with merely nominal interest, are in the same position as voluntary subscriptions, and are therefore



illegal; if carried to any great extent, they would afford a ground of offence.<sup>1</sup>

Finally, with regard to the question of neutral supplies of war munitions to belligerents, and the raising of war loans, we may refer to the following observations that were made in January 1915 by Mr. Bryan, the United States Secretary of State, to the Chairman of the Senate Committee on Foreign Relations. "There is no power in the Executive," he declared, "to prevent the sale of ammunition to belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighbouring American Republics, and then only when civil strife prevailed." After referring to German exports of enormous quantities of arms and ammunition to belligerents in the Russo-Japanese War and in the recent Balkan Wars, he added that in a Memorandum presented by the German Ambassador, December 15, the German Government recognized that under the general principles of international law no exception could be taken to neutral States that allowed war material to go to the enemy from or through neutral territory. Conformably to a statement issued by the Department of State on October 15, 1914, the United States itself took no part in contraband traffic. Moreover, it lent its influence towards equal treatment for all belligerents in the matter of purchasing arms and ammunition from private persons in the United States.

On the other hand, the question of war loans, he held, was different. "War loans in this country were disapproved because they were inconsistent with the spirit of neutrality. There is a clearly defined difference between a war loan and the purchase of arms and ammunition. The policy of disapproving of war loans affects all

<sup>1</sup> Phillimore, *op. cit.*, vol. iii. Appendix, p. 928; cf. Pitt Cobbett *Cases and Opinions on International Law* (London, 1918), part iii. pp. 865-6.

Governments alike, so that the disapproval is not an un-neutral act. The case is entirely different in the matter of arms and ammunition, because the prohibition of export not only might not, but in this case would not, operate equally upon the nations at war. Then, too, the reason given for the disapproval of war loans is the sale of arms and ammunition. The taking of money out of the United States during such a war as this might seriously embarrass the Government in case it needed to borrow money, and might also seriously impair the nation's ability to assist neutral nations which, although not participants in this war, are compelled to bear a heavy burden on account of the war. And, again, a war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of the American people might become more earnest partisans, having a material interest in the success of the belligerent whose bonds they hold." But the sale of contraband is a mere matter of business. "The manufacturer, unless particularly sentimental, would sell to one belligerent as readily as he would to another. No general spirit of partisanship is aroused—no sympathies excited." <sup>1</sup>

(c) Another question of neutrality that arose in the present war concerned China. At the time of the outbreak of hostilities, some of the belligerent States, for example, Great Britain, Germany, France, Japan, held leased territory in China. Thus in 1898 Germany entered into a treaty with China whereby the latter leased to the former Kiao-chau Bay and the adjacent territory for a term of 99 years. A similar concession was sought by Russia, to which soon afterwards Port Arthur and Talienwan (Dalny) were ceded in usufruct for a term of 25 years. In the same year Great Britain acquired Wei-hai-wei for as long a period as Port Arthur

<sup>1</sup> Published by the State Department, January 24, 1915. *The Times*, January 26, p. 10.

should remain in the possession of Russia, and also a lease for 99 years of a small strip of territory off Hong Kong. France followed with a lease of the Bay of Kwang-chau-Wan on the south coast of China. As the result of the Russo-Japanese war, and by the Treaty of Portsmouth, 1905, the Russian lease of Chinese territory was transferred to Japan. Strictly speaking, leases of this kind confer on the lessee only rights of user and enjoyment but not of sovereignty, which remains in the hands of the lessor. In actual practice, however, they are disguised cessions and amount, therefore, to complete alienations, effecting the transference of full power and dominion over the territories concerned. The alienations took the form of leases in order that the susceptibilities of China might not be hurt; and Germany was the first to declare openly their real significance and implication. Now after Japan had declared war against Germany and commenced operations against her acquired territory in China, the German Government, as well as the Austro-Hungarian, made a protest to China against the extension of the war zone. Germany claimed that she had the right to fortify and defend Tsingtau, that China should have forestalled the landing of the Japanese and held that the zone was extended to facilitate the operations of the Japanese, and thus China was responsible for the consequences of the granting of such facilities. The Chinese Government denied these claims and allegations; they emphasized that they had done their utmost, but without avail, to prevent the belligerents from operating in their territory, and that the war zone was unavoidably extended only after the landing of the Japanese; and they maintained that they could not be held responsible for the enforcement of strict neutrality within the specified zone.

(d) During the course of the war there were several reports that the South American Republics of Ecuador and Colombia were not observing the duty of impartiality incumbent on neutrals. In November an Anglo-French Note of protest was addressed to the United States, no doubt

because the Allies were desirous of respecting the spirit of the Monroe Doctrine. The Allies complained that Germany was allowed to use the wireless installations of the two States as intelligence centres for her naval forces. It was alleged that the wireless station on Colombian territory, though ostensibly worked under censorship, was really controlled by German influence. A further complaint was made that the Galapagos Islands were being used by the German ships as a naval base. The United States, therefore, was asked to bring pressure to bear on the States in question, in order to secure the proper observance of their neutrality; otherwise, it was intimated, the Allies would be obliged to take their own steps to bring the Republics to a sense of their responsibility.<sup>1</sup>

It was thought in Washington that the action of the Allies in giving the United States an opportunity of using her good offices in South America, before resorting to forcible measures, constituted the most generous acceptance of the Monroe Doctrine that had ever been made by Europe. Whilst the authorities in Washington fully appreciated this, they did not, however, see their way to interfere where they had no direct stake and were not closely concerned. Accordingly there would be no objection, it was suggested, to the landing of British and French marines in Latin American territory for the purpose of destroying the wireless stations, and taking similar punitive measures. The Monroe Doctrine would be imperilled only if such proceedings were followed by a permanent occupation of territory there. As Mr. Roosevelt wrote in his Presidential message of December 3, 1901: "We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American Power."<sup>2</sup> Likewise the Doctrine would not prohibit a German invasion of Canada, so long as it was merely temporary, and did not involve taking permanent possession of territory.

<sup>1</sup> *The Times*, November 14, p. 8.

<sup>2</sup> Cf. Moore, *Digest of International Law*, vol. vi. p. 590.

The Monroe Doctrine, which possesses a political, not a legal, character—though it is closely related to modern international law—owes its origin to the famous message of President James Monroe. When the Holy Alliance intended to apply its policy of intervention to the Spanish colonies in America which had acquired their independence, the President of the United States interposed, and declared to Congress, December 2, 1823, that the United States would regard any attempt by European Powers “to extend their system to any portion of this hemisphere as dangerous to our peace and safety,” and that “the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.”<sup>1</sup> Though the latter part of this declaration called forth the protests of Great Britain and Russia and was never formally recognized by the European States, nothing inconsistent with it has since then occurred.<sup>2</sup> In view of President Wilson’s determination to remain strictly neutral in the present war, we may recall the emphatic statement of American policy made by Jefferson in a communication to Monroe, October 24, 1823: “Our first maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle in cis-Atlantic affairs.” By virtue of this Doctrine, the United States came to acquire on the American continent a certain political hegemony, which has been recognized by the leading Powers of Europe. Thus, the United States intervened in 1865 between France and Mexico, in 1896 between Great Britain and Venezuela; but not in 1901, when three European Powers sought to make Venezuela fulfil her international duties. It was on that occasion that President Roosevelt made the observation which we have quoted above.

It ought to be added that in reply to the above-mentioned

<sup>1</sup> J. D. Richardson, *Messages and Papers of the Presidents of the United States*, 10 vols. (Washington, 1896), vol. ii. pp. 209, 218; cf. also Moore, *Digest of International Law*, vol. vi. chap. 20.

Anglo-French Note, the Chargé d'Affaires of the Colombian Legation stated that on September 1 a decree was issued by the Colombian Executive ensuring the neutrality of the Republic in regard to the working of the wireless stations at Cartagena and Santa Marta. These were the only stations of the kind in the country, and the contracts under which they were established specifically provided for the observance of the rules of neutrality in case of war. On September 11 a further decree was issued to the effect that, until the Government was satisfied as to the proper conducting of the censorship and transmission of despatches, the station at Cartagena should be closed. The station at Santa Marta belonged to an American company. Moreover, the Colombian Government had at a much earlier date, August 13 and 22, issued decrees and regulations to enforce the strict observance of neutrality generally in reference to shipping, navigation, and the use of ports. The Consul-General, too, denied the "favouritism" alleged to have been shown to Germany by his State, and spoke of the reports as being pure inventions. He asserted emphatically that there was no truth in the statement that the Galapagos Islands were used as a German naval base, or that the wireless stations were allowed to be used by Germany.

In the latter part of November the British Government was informed by the Chilean Minister in London that he had received a message from the Minister for Foreign Affairs in Chile, stating that the German steamers *Negada* and *Luxor* laden with coal sailed surreptitiously, the one from Punta Arenas and the other from Coronel. Accordingly, the Government of Chile prohibited the provisioning in any part of the Republic of the vessels of the *Kosmos* Company, to which these steamers belonged, and ordered that no ship should be allowed to leave any Chilean port. This provisional measure was intended to become definitive, if it were proved in the investigation that was being conducted that the said steamers carried coal for the purpose of supplying German warships.\*

\* *The Times*, November 28, p. 7.

Soon afterwards the Chilean Government issued an official statement to the effect that German warships had violated the neutrality of Chile by staying several days in the Juan Fernandez Islands, by capturing neutral ships, whose coal and provisions they seized, and by sinking a French sailing-vessel within the territorial waters of Chile.<sup>1</sup> The French Minister in Santiago made friendly representations to the Chilean Government requesting that Chile should make a protest to Germany, and demand an indemnity for the capture and loss of the French barque *Valentine*, which was sunk by German cruisers off the island of Masafuera in the Juan Fernandez group.<sup>2</sup>

Reports reached Washington that Germany also committed still more flagrant violations of neutrality in the Caribbean and middle Pacific waters.

More serious were the complaints made to the United States Government of German activities in American ports. It was suggested that in some cases there probably was collusion with persons on shore, and in other cases that the shippers were deceived. A striking instance was that of an American vessel, the *Sacramento*, which was taken over under a new registry law from the original German owners. In October she cleared from San Francisco with 6,000 tons of coal and a cargo of provisions, and about a month later she arrived at Valparaiso without either coal or provisions. Probably one of two things happened. If the vessel was transferred in good faith to the American flag, she must have been seized and her cargo taken by German cruisers. But if the change of registry was fraudulent, then the vessel remained under German control. Either alternative was disconcerting to the United States Government, and consequently an investigation was ordered.<sup>3</sup>

As far back as the middle of August the American authorities were already taking stringent measures to enforce the neutrality regulations against the German cruisers *Leipzig* and *Nuremberg*.<sup>4</sup>

<sup>1</sup> *The Times*, November 26<sup>th</sup>, p. 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, August 20, p. 5.

A further example of the vigilance of the United States Government and their determination to fulfil strictly the obligations of neutrality was reported from Washington (December 16), in reference to the German converted cruiser *Cormoran*. When she arrived at Guam in the Ladrone Archipelago (Western Pacific), she was given 24 hours in which to leave the port, failing which she would be interned.

(e) Next we come to some interesting questions with regard to the use by belligerents of interoceanic canals, like the Panama Canal and the Suez Canal. According to the principles of international law, canals constituting a waterway for international traffic should be subject to the control and jurisdiction of the respective States in which they lie, and should be open to the vessels—warships as well as merchantmen—of all nations for purposes of innocent use. These and other general principles have been adopted in treaties in the case of both of these great canals. The Kiel Canal, connecting the Baltic with the North Sea, was similarly opened to the ships of all nations, but it was deemed by Germany to have been constructed rather for strategic purposes than for international traffic. Let us now consider a little more fully the position of the Panama and Suez canals from the point of view of international law.

The construction of the Panama Canal was begun in 1881 by a company under the direction of Ferdinand de Lesseps, who had obtained concessions for the purpose. In 1889 the work was suspended, owing to the insolvency of the company, but was afterwards resumed by another body, the New Panama Company. In 1904 the latter sold its rights to the United States, which took up the operations under a treaty concluded (1903) with the newly-established Republic of Panama. By this instrument, known as the Hay-Varilla Treaty, the United States acquired "in perpetuity the use, occupation, and control of a strip ten miles wide and extending three nautical miles into the sea at either terminal, with



all lands lying outside the zone necessary for the construction of the canal or for its auxiliary works, and with the islands in the Bay of Panama.”<sup>1</sup> In return for these concessions, the United States engaged to make an immediate payment, also certain annual payments, and to guarantee the independence of the Republic of Panama. In the meantime an obstacle was presented by the Clayton-Bulwer Treaty, 1850, entered into between Great Britain and the United States, in view of such a canal being eventually constructed. It stipulated, among other provisions, that neither Power should exercise exclusive control over a canal of this kind, or erect any fortifications there. However, this was ultimately superseded by the Hay-Pauncefote Treaty, 1901, whereby the construction of the canal was to be under the auspices of the United States, which was also to have the exclusive right of regulating and managing it, and rules providing for its neutralization were laid down as follows: (1) The canal shall be free and open to warships and merchantmen of all nations on terms of equality. (2) It shall never be blockaded, nor shall any act of war be committed therein, though it is to be subject to the police powers of the United States for the purpose of protecting it against lawlessness and disorder. (3) Belligerent warships shall not revictual in the Canal or take in stores except in case of necessity, or embark or disembark troops and munitions of war; and they shall be required to pass through the canal with the least possible delay, according to the regulations in force. Prizes shall be subject to the same rules. (4) These provisions shall also apply to waters adjacent to the canal within three marine miles of either end. (5) Belligerent warships are not to remain in such waters longer than twenty-four hours at any one time except in case of distress, in which case they must depart as soon as possible; but a man-of-war of one belligerent shall not depart within twenty-four hours of the departure of a man-of-war of the other belligerent. (6) All buildings and works connected with the canal shall enjoy complete

<sup>1</sup> Message of President Roosevelt, December 7, 1903.

immunity from attack in time of war.<sup>1</sup> It is to be noted that this treaty did not include a clause found in the earlier treaty declaring that no fortifications were to be erected commanding the canal or the adjacent waters. It would follow from this significant omission—though opinions have been expressed to the contrary—that the United States is justified in claiming the right to fortify the entrances. Though these provisions affect primarily the parties to the treaty, yet virtually, because of their wide application in reference to all other Powers, they constitute general rules, and will no doubt come to be recognized as part of the written international law.

Having regard to these stipulations, as well as to the Hague Regulations concerning the use of neutral ports by belligerent warships, the United States Government in the middle of November issued rules for the use of the Panama Canal by the States at war: (a) For the passage of the canal the written permission of the canal authorities is necessary. (b) Belligerent vessels are only allowed stores sufficient to enable them to reach a friendly port. All such stores must come from the canal authorities and not from private firms. (c) No belligerent vessel may remain more than twenty-four hours in the canal, or to leave it within twenty-four hours of the departure of an enemy vessel. (d) Not more than three vessels of any belligerent or the allied belligerents shall be allowed simultaneously in the canal or in the waters of the Isthmian zone. (e) No repairs are allowed save in case of distress. (f) No rising or descending of aircraft is permitted. (g) Conformably to the agreement with Panama, no belligerent vessel may use a port on the Isthmian zone more than once in three months.<sup>2</sup>

The Suez Canal raised questions much more difficult than those concerning the Panama Canal. By reason of various important facts, namely that it lies within a State

<sup>1</sup> Article 3, sections 1-6. These sections are similar to those relating to the Suez Canal, which will be referred to later.

<sup>2</sup> *The Times*, November 16, p. 7.

whose civilization differs substantially from the European, and which was till the present war in the occupation of Great Britain (now under her protection), that it was constructed and is owned by a French company under a concession from the Khedive of Egypt, confirmed by his suzerain the Sultan of Turkey, that Great Britain is the largest shareholder, that most of the vessels using it are British, and that it is an international waterway of the greatest importance to the world's commerce—by reason of all these considerations the Suez Canal stands in a class by itself, and cannot therefore be covered by the general principles of international law. Its legal position, then, can be determined only by special convention.

In 1867 the Suez Canal was opened for traffic. In 1875 the British Government purchased the Khedive's shares. In 1882 it was occupied by Great Britain, and traffic was for a time suspended. Three years later a commission was appointed by several European Powers for the purpose of establishing the free navigation of the canal, and after much negotiation a Convention was made (1888) by Great Britain, France, Germany, Austria-Hungary, Russia, Italy, Spain, the Netherlands, and Turkey. The essential rules laid down, which are for practical purposes rules of international law, are as follows: (1) The canal is to be open in time of war as in time of peace to all vessels, whether warships or merchantmen. (2) Its entrances are not to be blockaded. (3) No acts of hostility are to be committed in the canal or its ports of access or within three miles therefrom. (4) No permanent fortifications are to be erected on the canal. (5) Belligerent warships may not embark or disembark troops or munitions of war within it or its ports, or revictual or take in stores, or remain more than twenty-four hours save in case of necessity; and the same provisions apply to prizes. (6) If vessels of different belligerents are in the canal or its ports, then twenty-four hours shall elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to the other. (7) No men-of-war shall be

stationed inside the canal, but each non-belligerent Power may station two warships in the ports. (8) If the canal is threatened Egypt shall take the necessary measures to enforce these provisions, and in case of need may appeal to Turkey, and through Turkey to the signatory States. The territorial rights of Turkey and the sovereign rights of the Sultan and the Khedive are reserved, subject to the terms of the Convention.

Great Britain made reservations against any provisions that might fetter her liberty during her occupation of Egypt, but withdrew them in the Anglo-French agreement, 1904. However that may be, the protection of the freedom of the Suez Canal in the interests of the world's commerce must be considered to be in the hands of the Power that is in the best position to adopt the necessary measures to that end; and considering various circumstances of vital importance, we must recognize that that Power can be no other than Great Britain. In 1882, at the time of the revolt under Arabi Pasha, such measures were taken by the British Government; troops were landed at Ismailia to prevent any attempts at wrecking. And now, having regard to the indiscriminate destruction and ruthless devastation that this war has already seen, it would be perfectly justifiable for Great Britain to build fortifications to safeguard the canal, just as the United States has claimed the right to construct strongholds in the case of the Panama Canal.

It may be pointed out that neither the Panama Canal nor the Suez Canal is, strictly speaking, neutralized; they are rather "internationalized"—to use an expression of Lord Cromer's. The latter quotes Lord Pauncefoot to the effect that the word "neutralization," as applied to the Suez Canal, "had reference only to the neutrality which attaches by international law to the territorial waters of a neutral State, in which a right of innocent passage for belligerent vessels exists, but no right to commit an act of hostility."<sup>1</sup>

<sup>1</sup> Lord Cromer, *Modern Egypt*, vol. ii. p. 384.

For some time after the outbreak of the war several German merchantmen had been lying up in the ports of the Suez Canal. At one time there were twelve at Port Said, three at Suez, and seven at Alexandria. These apparently intended to remain in the harbours either till the end of the war or until an opportunity presented itself for doing some mischief—for example, by sinking themselves, and endangering the freedom of navigation of this great international waterway. Accordingly, the Egyptian Government took steps in October to remove those vessels, which had evidently proposed, inconsistently with the Convention, to secure for a long and indefinite period an undisturbed refuge, and so make such use of the canal as was incompatible with the very purposes for which it was "internationalized." This action on the part of the Egyptian Government had not, indeed, any precedent, nor was it covered specifically by any of the articles we have given above; but it was undoubtedly justified by the fundamental principles of neutrality, and by the necessity to protect an avenue of commerce that is used by the whole world. These vessels had refused a pass offered to them to allow them to proceed unmolested to a neighbouring country; so that after they had been towed out to sea they were, properly, taken in charge by British cruisers, and became liable to condemnation by the Prize Court established at Alexandria.

Shortly afterwards his Majesty's Government issued the following notification to the representatives of foreign maritime Powers, and asked them to communicate it to their respective Governments: "Since the outbreak of war certain ships of enemy countries have remained in the Suez Canal. Some of these vessels were detained by the Egyptian Government on account of hostile acts committed in the canal; some because there was reason to apprehend that they contemplated hostile acts; others, though perfectly free, have refused to leave the canal in spite of the offer of a free pass, thus disclosing their intention to use the ports of the canal merely as ports of refuge, a measure

which is not contemplated by the Suez Canal Convention. His Majesty's Government do not admit that the conventional right of free access to and use of the canal enjoyed by merchant vessels implies any right to make use of the canal and its ports of access for an indefinite time to escape capture, since the obvious result of permitting any such course must be greatly to incommode and even to block the use of the ports and canal by other ships, and they are consequently of opinion that the Egyptian Government are fully justified in the steps which they are taking to remove from the canal all enemy ships which have been long enough in the canal ports to show clearly that they have no intention of departing in the ordinary way, and that they are putting the canal and its ports to a use which is inconsistent with the use of the canal in the ordinary way by other shipping."

Subsequent events clearly showed that the proceedings adopted by the Egyptian Government were not only justifiable, but supremely wise. The Ottoman Empire being at war with Great Britain, the safety of the Suez Canal was menaced by the very Power that had been constituted its protector. Accordingly, Egypt having been declared a British Protectorate, owing to the Khedive's espousing the cause of the Sultan, the territorial rights in regard to the canal, which formerly vested in Turkey, were transferred to Great Britain. The agents of the Powers in Cairo who, according to the Convention, may be appealed to for the purpose of adopting all protective measures necessary, confirmed the right of the British Government to take whatever steps were called for to safeguard the navigation of the international highway.

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## CHAPTER XVI

### BELLIGERENTS AND NEUTRALS—TURKEY, EGYPT, HOLLAND AND THE SCHELDT

(a) IN the preceding chapter we referred to the position of Turkey with regard to the Suez Canal. Now we have to consider various acts of the Ottoman Government that concern the law of neutrality, as well as other provisions of international law. We shall deal first with Turkey's denunciation of the capitulations, then with her duty as to the Dardanelles, and afterwards with her breaches of neutrality and hostile conduct towards Russia and Great Britain.

Owing to the fact that Oriental habits, religious feelings, legal conceptions and administration of justice differ, in many fundamental matters, from those prevailing in European countries, it was from an early date thought necessary by the Governments of the latter to withdraw their subjects from the jurisdiction of the native courts of Asiatic States. Such exemption was brought about by means of treaties or capitulations, supported by custom and prescription originating in the tacit consent of the local sovereigns. Judicial authority over Europeans and Americans residing within Eastern and Turkish territory was conferred on the Consular Courts of the States to which the residents belong. Thus throughout the Ottoman Empire, Great Britain possessed a number of Consular and Vice-consular Courts, culminating in the Court of the Consul-General at Constantinople. Their power is derived, in virtue of the relative Convention, from a series of Foreign

Jurisdiction Acts, and Orders in Council. Similarly the power of the United States Consular Courts is based on a number of Acts of Congress. In Egypt the Consular Courts were in 1876 replaced by mixed tribunals, usually designated International Courts. In Japan the extra-territorial privileges of consuls were abolished in 1899. These consuls, then, occupy the position of judges, and enjoy most of the diplomatic privileges and immunities, including inviolability.

In September, before Turkey became a belligerent, the Sublime Porte denounced the capitulations. Such unilateral repudiation was undoubtedly illegitimate, though it may be admitted that many difficulties and anomalies had been brought into existence as a result of extensive accretions of custom to the original treaty stipulations. If the Ottoman Government had come to the conclusion that abuses of the consular jurisdiction had crept in, they were entitled to enter into negotiations with the Powers concerned for the purpose of removing them, and abolishing unjustifiable encroachments. It was not within their right to renounce the treaties altogether. Thus, when in 1870 Russia attempted to set aside certain provisions of the Treaty of Paris (1856), which excluded her ships from the Black Sea, it was proclaimed at a conference of Powers in London, that in accordance with the principles of international law no State may liberate itself from the engagements of a treaty, or modify its stipulations without the consent of the other contracting parties.<sup>1</sup> This question need not be elaborated here, as we have already discussed it fully in the earlier chapters.

A more serious breach of duty on the part of Turkey was her disregard of her obligations in respect of the Dardanelles. According to the general principles of international law, maritime States are obliged to allow all ships of friendly countries free passage through their territorial waters connecting portions of the high seas. But the Dardanelles and

<sup>1</sup> *British Parliamentary Papers, Protocols of London Conference, 1871, p. 7.*



the Bosphorus have for a long time been taken out of this rule, and have been governed by special conventions; that is, in their case the common law of nations has been deliberately modified by written law. In former times, when the Black Sea was entirely surrounded by Turkish territory, it was regarded, together with the Straits connecting it with the Mediterranean, as being subject to her dominion. But Russia having acquired possessions on its shores, claimed the right, and enforced it in 1774, to use the Straits for her merchantmen. Warships were still excluded; and this exclusion was further sanctioned in 1809 by a treaty between Great Britain and the Ottoman Empire. The principle was similarly recognized in the Treaty of London, 1841, and certain modifications were introduced by the important Treaty of Paris, 1856,<sup>1</sup> entered into by the five great European Powers and Turkey, by which the Black Sea was declared neutral, and open to all merchant vessels but not to warships, except certain light cruisers for police purposes. By the Treaty of London, 1871,<sup>2</sup> Russia obtained the power to maintain vessels of war in the Black Sea and to establish naval arsenals on its shores; the principle of excluding warships from the Straits was maintained subject to the right of the Sultan to open them in time of peace to friendly Powers, if he should deem it necessary in order to enforce the observance of the Treaty of Paris. Such are the provisions that determine the legal position of the Dardanelles and the Bosphorus; and on two notable occasions before the present war, attempts were made, but unsuccessfully, to evade the rules. In the Russo-Japanese War, 1904-5, Russia despatched vessels of her Black Sea fleet to the Mediterranean, which first flew a commercial flag, and then converted themselves in the open sea into warships. After a protest from Great Britain Russia abandoned the enterprise. Again, in the Turco-Italian War, 1912, the rule of free navigation of

<sup>1</sup> Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1255.

<sup>2</sup> *Ibid.*, vol. iii. p. 1921.

the Straits came into conflict with the necessity of self-defence on the part of Turkey. The latter mined the Dardanelles, as a protection against the Italian fleet. A protest from neutral countries caused the removal of the mines and the opening of the Straits to merchantmen.

From the above it is clear that when Turkey, then neutral, allowed the German warships, the Goeben and the Breslau, to pass the Straits and to commit hostile acts in her territorial waters, she violated a long series of international conventions, as well as her obligations of neutrality imposed by international law in general. The Goeben and the Breslau had taken refuge in the Dardanelles August 11, and were welcomed by the Turks, who readily supplied them with large quantities of coal. They were permitted to search French, English, and Greek shipping in the harbour for contraband of war; and to interfere with two French liners, and to destroy the wireless installation on board one of them, the *Sagalien* (belonging to the *Messageries Maritimes*), which they threatened to sink if she offered any resistance. In reply to a Note of protest delivered by the French Ambassador at Constantinople (August 17), the Turkish Government, by expressing their regret in most formal terms, acknowledged their non-fulfilment of legal obligations, and desired the French Government to regard the "deplorable incident" as closed.

But the Ottoman Government did not confine themselves to such breaches of law. A statement issued by the Foreign Office, November 1, presented a catalogue of serious delinquencies committed by Turkey. Besides her connivance at the operations of the German men-of-war in the Straits, Turkish warships, without any provocation, without declaring war or giving notification, made wanton attacks (October 29) on open undefended towns situated on the Black Sea and belonging to a friendly country. The Turkish Government had made promises to send away the German officers and crews of the Goeben and the Breslau, but never fulfilled them. Since the outbreak of

the war, and when Turkey was ostensibly neutral, she received in Constantinople large numbers of German officers. She also prepared an armed force for an attack upon Egypt, despatched mines to be laid in the Gulf of Akaba, urged Mohammedans to take up arms against Great Britain, and incited the Syrians to make war on the British. On October 30 she summarily and without notice shut off telegraphic communication with the British Embassy at Constantinople. All these proceedings were for a considerable time borne with extraordinary patience by Great Britain, France, and Russia, who protested against the numerous violations of neutrality. At last, on November 5, a notice issued by the Foreign Office stated that owing to hostile acts committed by Turkish forces under German officers, Great Britain declared war against Turkey.

In order to enlarge and illustrate the above considerations, and to show the various important matters of international law concerning the relationships of the belligerents with Turkey before war was declared against her, it will be well to record here the regulations that had originally been drawn up by Turkey with a view to enforcing her neutrality for the entire duration of the war. On October 4 the British Ambassador pointed out to the Turkish Government that so far the practices had not been in conformity with these rules. Thus:—

Rule 1: Belligerent warships were not to enter Ottoman ports except in case of damage or on account of stress of weather, in which case they were to depart as soon as circumstances permitted—that is, after having effected repairs, or after the weather had become moderate.<sup>1</sup>

Rule 2: No belligerent warship, even though authorized for special reasons, such as procuring food and provisions, to enter an Ottoman harbour, was to remain more than twenty-four hours.<sup>2</sup>

Rule 4: Such vessels as exceeded a visit of twenty-four

<sup>1</sup> Cf. the Thirteenth Convention of The Hague (1907), Article 17.

<sup>2</sup> Cf. *ibid.*, Article 12.

hours were to be dismantled, so that they might take no further part in hostilities during the war<sup>1</sup>

These rules were disregarded by the Turkish Government, when they allowed the German warships, the Goeben and the Breslau, to enter the Dardanelles, and remain in Turkish territorial waters for an indefinite period, on the pretext that a sale—as to the genuineness of which there was no evidence—had taken place. Both vessels remained under German control, and were in a state of complete preparation to proceed to sea.

Rule 5: No acts prejudicial to Ottoman neutrality were to be performed, including acts of search and capture.<sup>2</sup>

This rule was violated in a flagrant manner by the Breslau, when she visited and searched British ships in the Dardanelles soon after her arrival there. The Imperial Government never demanded any public satisfaction from the German Government for this outrage on their neutrality. By thus condoning the act, the Imperial Government failed in their own duties as a neutral Power.

Rule 7: Only such damages were to be repaired—and repaired expeditiously—as were strictly necessary for safe navigation; and nothing was to be done there to increase the fighting strength of warships.<sup>3</sup>

Rule 8: Belligerent warships returning a second time to the same Ottoman port were not to revictual, etc., except subject to strict limitations imposed by the Turkish Government.<sup>4</sup>

Turkey did not observe these rules. The Goeben and the Breslau were repaired under the auspices of the official representatives of the German Government; they put to sea under German command, and were revictualled at German expense on returning from their various cruises in the Black Sea.

Rule 12: No belligerents were to use Ottoman waters as a base for naval operations against their enemies, or to

<sup>1</sup> Cf. the Thirteenth Convention of The Hague (1907), Article 24.

<sup>2</sup> Cf. *ibid.*, Article 2.

<sup>3</sup> Cf. *ibid.*, Article 17.

<sup>4</sup> Cf. *ibid.*, Articles 19 and 20.

install wireless stations in Turkish territory and territorial waters for serving as a means of communication with the belligerent forces on land or sea.<sup>1</sup>

Turkey disregarded this obligation; the violation of this rule by several vessels, for example the *General*, the *Lily Rickmers*, and the *Corcovado*, was not checked by the Ottoman Government. In some cases, too, German ships were allowed to fly the Turkish flag, as a result of fictitious and illegal transfers.

Rule 13: The status of the Straits was declared to be unaffected by these regulations, as it was governed by international treaties.<sup>2</sup>

This rule was violated by the Ottoman authorities themselves, who interfered with the free passage of the Dardanelles by British merchantmen.

The final despatch of the British Ambassador at Constantinople, dated London, November 20, 1914, gave further details in reference to the Turkish violations of neutrality. The great interest attaching to this despatch from the point of view of international law justifies the insertion here of the greater part of it. "On my return to my post on the 16th August, a fortnight after the outbreak of the European war, the situation was already such as to give ground for the apprehension that Turkey would be driven by Germany sooner or later to take part in it as her ally. The Ottoman army, under the supreme command of Enver Pasha, who was entirely in German hands, had been mobilized, and although the Government had declared their intention of preserving their neutrality, they had taken no proper steps to ensure its maintenance. They had, on the contrary, jeopardized their ability to do so by the admission of the German warships *Goeben* and *Breslau* into the Dardanelles on the 10th August. . . . In pursuance of a long-prepared policy, the greatest pressure was at once exercised by Germany to force Turkey into hostilities. German success in the European war was said to be assured.

<sup>1</sup> Cf. the Thirteenth Convention of The Hague (1907), Article 5.

<sup>2</sup> Cf. the treaties mentioned above.

The perpetual menace to Turkey from Russia might, it was suggested, be averted by a timely alliance with Germany and Austria. Egypt might be recovered for the Empire. India and other Moslem countries, represented as groaning under Christian rule, might be kindled into a flame of infinite possibilities for the Caliphate of Constantinople. Turkey would emerge from the war the one great Power of the East, even as Germany would be the one great Power of the West. Such was the substance of German misrepresentations. . . . The Turkish Government made no effort to emancipate themselves from German influence or to stem the tide of its progress. The material hold established by the introduction of the two German ships was, on the contrary, allowed to be strengthened. Not only did these ships remain under effective German control, but a strong German element was imported into the remainder of the fleet, even before the British naval mission, which had been reduced to impotence by order of the Minister of Marine, had been recalled by his Majesty's Government. Large numbers of Germans were imported from Germany . . . to be employed in the forts of the Dardanelles and Bosphorus and at other crucial points. Numerous German merchant vessels, of which the most important were the *Corcovado* and the *General*, served as bases of communication and as auxiliaries to what had become, in effect, a German Black Sea fleet. Secret communications with the German General Staff were established at the outbreak of the war by means of the wireless apparatus of the *Corcovado*, which was anchored opposite the German Embassy at Therapia, and which was continuously used for this among other purposes throughout the whole period under review, in spite of my urgent representations and those of my French and Russian colleagues. Other German ships played with the Turkish flag as they pleased, in order to facilitate their voyages or cloak their real character while in port, and a department was constituted at the German Embassy for the purpose of requisitioning supplies for

the use of the German Government and their ships. All these things were tolerated by a complaisant Turkish Government, who appeared to be indifferent to the incessant encroachments on their sovereignty, if not to welcome them. On land the officers of the German military mission displayed a ubiquitous activity." The despatch says they were supreme at the Ministry of War, and they were the main organizers of the military preparations in Syria aimed at Egypt. "The Syrian towns were full of German officers, who were provided with large sums of money for suborning the local chiefs. . . . The Khedive himself was a party to the conspiracy." The Ambassador then points out that on October 29 an armed body of 2,000 Bedouins made an incursion into the Sinai peninsula, and occupied the wells of Magdaba with a view to attacking the Suez Canal. On the same day Odessa and other Russian ports on the Black Sea were attacked under orders given by the German admiral on the evening of the 27th. The communiqué published by the war party, stating that the first acts of hostility in the Black Sea had come from the Russian side, was an "untrue and grotesque . . . invention."

Soon after war had been declared against Turkey, Ottoman gendarmerie made an attack on the British Consul at Hodeidah.<sup>1</sup> He sought refuge in the adjoining Italian Consulate, but was later arrested by the gendarmes after they had stormed the place. This outrage on the Italian Consulate and the violation of the right of asylum aroused public opinion in Italy. The Italian Foreign Minister, Baron Sonnino, said in the Chamber, December 11, that the incident had come to his notice only on November 9, and that he had immediately telegraphed to Constantinople asking for the release of the British Consul, as well as reparation for detaining the Italian Consul. The Ottoman Government in their reply several days later said that communications had been interrupted between Constantinople and Hodeidah, and that they would take the necessary

<sup>1</sup> *The Times*, December 14, p. 7.

measures in the affair. On December 15 Baron Sonnino announced in the senate that the Turkish Government had agreed to despatch orders through the Governor of the Yemen for the release of the British Consul, and for the immediate dismissal of all persons responsible for the outrage.

(b) Owing to the war with Turkey and the hostile conduct of the Khedive, Egypt was declared a British protectorate. Its position in relation to international law may be here indicated.

First as to its position before the war. For centuries Egypt had been a vassal State of the Ottoman Porte. After the destruction of the Mamelukes, Mehemet Ali, her ruler, revolted against the Sultan (1831), and attempted to set himself up as an independent sovereign. This brought about the treaty concluded at London, 1840, between Great Britain, Russia, Prussia, and Austria—to which the Sultan acceded by his firman of 1841—whereby Egypt became an hereditary pashalic under the rule of Mehemet Ali and his lineal descendants, on the payment of an annual tribute to the Sultan as suzerain. The pasha was empowered to collect, in the name of the Sultan, the lawfully established taxes for defraying the expenses of the administration of the country. By later concessions, in 1873 and 1879, he obtained the title of Khedive, and many of the rights of sovereignty, for example, the power to conclude non-political treaties, and to maintain armed forces, though the coinage was still to be issued in the name of the Sultan, and the flag was to remain that of Turkey. From 1879 Egyptian affairs were conducted under the supervision of a British and a French Controller-General; but in 1882, when the revolt of Arabi Pasha broke out, France held aloof, and England intervened, restored the authority of the Khedive, and, after a decree was issued abolishing the joint control, appointed a financial administrator. British military occupation, however, continued; in 1904 by the Anglo-French agreement France abandoned her demand for British



withdrawal; and other Powers afterwards recognized the occupation. Justice in Egypt was administered, conformably to the capitulations, under European control, first by consular courts, then by international courts. All these facts show that the international position of Egypt was anomalous.

After the outbreak of war, Parliament passed a Bill for the establishment of Prize Courts in Egypt, Zanzibar, and Cyprus. The Naval Prize Act, 1864, provided for the establishment of Prize Courts in any part of the British Dominions, of which those three countries could not strictly be said to form constituent parts—Egypt being a militarily occupied country, Zanzibar a protectorate, Cyprus a leased territory. In 1888 a Prize Court was, however, set up in Zanzibar, under the Foreign Jurisdiction Act; but with regard to Egypt it is not clear whether this action was compatible with the capitulations. In any case, the measure adopted shows that the British Government decided to regard the country as possessing a belligerent character. For by Article 4 of the thirteenth Convention of the Hague (1907), which is in accordance with long-established British practice, a Prize Court may not be set up on neutral territory.

By a treaty of 1878 in respect to Cyprus, Turkey, without abandoning her sovereignty over the island, granted to Great Britain the right of occupying and administering it, subject to the annual payment to Turkey of a certain sum out of the net revenue. After the outbreak of war with Turkey, Cyprus was formally annexed as a portion of the British Empire, and a Proclamation forbidding trading with Turkey declared that all Turkish subjects, excepting the inhabitants of Cyprus, were enemies.

The anomalous position of Egypt—whose native inhabitants were in law Ottoman subjects, and in fact were, despite the war with the Sultan, considered as alien friends—was terminated by the British declaration which constituted the country a protectorate. The following announcement was issued December 17: "His Britannic Majesty's

Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of his Majesty and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and his Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests. The King has been pleased to approve the appointment of Lieutenant-Colonel Sir Arthur H. McMahon to be his Majesty's High Commissioner for Egypt." On the day following this announcement the French Government notified their recognition of the British protectorate over Egypt, and in return the British Government notified their adherence to the Franco-Moorish treaty of March 30, 1912.

A distinction is to be drawn between what has been called a "colonial protectorate" and an "international protectorate." In the case of the former the protected territory is that of an uncivilized or semi-civilized people, and is usually reserved for future annexation to the dominions of the protecting State, which exercises some authority over the native population and claims to exclude the interference of all other Powers either with the inhabitants or with the territory. Such authority is frequently based on treaties entered into between the chiefs or tribes; but it is exercised rather in accordance with the laws and regulations established by the protecting Government. The systems of internal administration vary in different places. In some, legislative and judicial powers are prescribed by Orders in Council, and exercised directly by the Crown or through the medium of a chartered company; in others, the internal affairs are almost entirely administered by the local authority. Numerous examples of colonial protectorates are found in Africa. Some of those that had been controlled by Germany have, as a result of the present war, already been taken from her. An international protectorate, on the other hand, refers to a weaker or inferior State that is placed under the protection of a

more powerful one, especially in regard to the conduct of foreign affairs, and retains a certain international personality. Here the position of the protecting State is apparently that of a trustee, who, assuming international responsibility for the ward, is empowered to intervene in the latter's domestic affairs, too. Egypt has now become a British "international protectorate"; her former Khedive was deposed and a Sultan appointed. An announcement issued by the Press Bureau, December 18, stated: "In view of the action of his Highness Abbas Hilmi Pasha, lately Khedive of Egypt, who has adhered to the King's enemies, his Majesty's Government has seen fit to depose him from the Khedivate, and that high dignity has been offered, with the title of Sultan of Egypt, to his Highness Prince Hussein Hamel Pasha, eldest living Prince of the family of Mehemet Ali, and has been accepted by him." It will be noted that the title of Sultan was adopted partly because that of Khedive had been conferred by an Ottoman firman. The newly constituted Sultan is an uncle of the deposed Khedive, and his selection appears to be in conformity with the Turkish law of succession.

In a letter, dated Cairo, December 19, 1914, addressed to Prince Hussein by the Acting High Commissioner in Egypt, reasons were given for this change. It was stated that there were two parties in the Ottoman Cabinet: firstly, a moderate party, duly recognizing Britain's avowed attitude with regard to Turkey and Egypt; and secondly, a band of unscrupulous international adventurers, who, by joining the enemies of Britain, expected to retrieve the various disasters into which they had plunged their country. For a long time his Majesty refrained from retaliatory action, in spite of their flagrant violations of neutrality, but at last was compelled thereto by their open hostilities, sanctioned by the Sultan. The Khedive having espoused the cause of Britain's enemies, his rights, as well as those of the Sultan, over the Egyptian executive were forfeited to his Majesty.

As to the future Government of Egypt it was pointed out that the British Government considered themselves trustees

for the inhabitants of Egypt, and accepted full responsibility for the defence of her territory against all aggression. All Egyptian subjects will be entitled to receive the protection of Great Britain. The disappearance of Turkish suzerainty will remove the various restrictions that had been imposed by firmans on the strength and organization of the new Sultan's army and on his bestowal of honours. As to foreign relations, they will be conducted, conformably to the responsibility assumed by Great Britain, through his Majesty's representative in Cairo. With regard to judicial administration the British Government have repeatedly expressed their view that the system of capitulations no longer harmonized with the development of the country; and therefore a revision will be made after the termination of the war. In all internal affairs Britain will remain faithful to the policy she has pursued, and will continue to work through and in close association with the constituted Egyptian authorities, in order to secure individual liberty, to promote the spread of education, to further the development of the country's natural resources, and as far as possible to associate the governed in the task of government. Religious convictions will be scrupulously respected; the British Government have no feelings of hostility towards the Khalifate, though Egypt is liberated from all political obligations to Constantinople. Finally, it was stated that the General Officer commanding his Majesty's forces is entrusted with the maintenance of internal order, and with the prevention of any attempts to render aid to the enemy.

(c) During the present war much doubt was expressed in several quarters as to the legal position of the Scheldt with regard to the belligerents. Before we consider the questions to which this international river gives rise, a few observations should be made on the neutral attitude of Holland.

At the commencement of the European conflict, Holland, like other countries, declared her neutrality, and also laid down in a series of regulations the provisions she had made to safeguard and enforce her neutral rights and obligations.

These regulations practically followed the rules of the Hague Convention, as we have stated them in the preceding chapter. Thus it was forbidden to belligerent forces or to convoys of munitions to cross any part of her territory, and to belligerent warships or ships assimilated thereto to pass through her territorial waters. It will be remembered that Article 9 of the thirteenth Convention requires every neutral State to apply impartially to the opposing belligerents the conditions, restrictions, or prohibitions regarding the legitimate use of its ports and territorial waters. It does not debar a neutral from altogether prohibiting access thereto. Accordingly Holland, in one of her regulations, forbade warships not only to pass through her territorial waters, but also to enter them at all. Such territorial waters were stated to comprise coastal waters for a distance of three nautical miles, and in the case of inlets for a distance of three miles from a line drawn across the river at the point nearest the entrance where the mouth of the inlet is not wider than ten miles. According to this provision, the Dutch territorial waters include the mouths of the Scheldt, Meuse, Lek, Waal, and Rhine.

Holland was evidently determined to put forth every endeavour in order to safeguard her neutrality. In the middle of December 1914, the Dutch Minister for Foreign Affairs, after stating in the Second Chamber of the States General that Holland had been assured by the surrounding Powers that they fully appreciated her position, observed: "There must always remain the possibility of conflict, and for this reason Holland cannot be too keenly on the alert. Our neutrality is not an expression of indifference or weakness. For the maintenance of neutrality character is necessary. Neutrality does not suppress individual sympathies, but it holds the reins in public opinion. The Dutch Government will maintain its independence with strength and force."<sup>1</sup>

Owing to the danger that certain commodities consigned to neutral ports might be forwarded to the German and

<sup>1</sup> *The Times*, December 18, p. 7.

Austrian Governments, several neutral States, in order to preserve their impartiality, undertook to prohibit such proceedings on the part of their subjects. Thus Holland promised that breadstuffs would not be supplied to combatants, as her Government would purchase all articles of this kind arriving in the country. But she found herself in a difficult position in consequence of the Rhine Acts, whereby she is obliged to let through to Germany by the Rhine such consignments as arrive on a through bill of lading, or on the order of a merchant declaring that they are in transit, or on proof by documents of the transit. In order to preserve her neutrality she cannot and is not entitled to abrogate the Rhine Acts, for their breach might well be regarded by Germany as constituting a *casus belli*. The only course, then, remaining to the allied fleets is to stop the suspected cargoes before they reach Dutch territorial waters; for the Dutch Government, notwithstanding general undertakings or guarantees, would be powerless to interfere with the transportation of goods arriving under the Rhine Acts.

In many quarters great difficulties were experienced in determining the precise legal position of the Scheldt in regard to the war. Some writers declared that the Dutch claim to sovereignty over the river mouth was never admitted by Belgium; others emphasized that belligerent men-of-war were not entitled to have access to Dutch waters, unless German troops violated the neutrality of Holland; others, again, maintain that the passage of the Dutch portion of the Scheldt could in certain circumstances be permitted by the Netherlands Government to warships of the combatants. However this may be, the allied fleets were greatly embarrassed by the fact that international rivers like the Scheldt, the Rhine, and the Meuse have their mouths in Dutch territory. According to a long-established rule of international law, and expressly recognized by the Declaration of London, a blockade, as an operation of war, must be limited to the ports and coasts belonging to or occupied by the enemy; the blockading forces must not bar

<sup>1</sup> Declaration of London, Article 1.

access to neutral ports or coasts.<sup>1</sup> These rules apply equally to the case of an international river whose mouth is situated in a neutral country. Hence the mouths of these rivers could not be blockaded in order to prevent merchantmen from passing through them to the enemy country. Again, owing to the long-asserted rights of Holland over the mouth of the Scheldt—though they have been frequently contested by Belgium—it was impossible on the one hand to remove a considerable number of German prizes that had been seized at Antwerp, and on the other to transport by the river-mouth troops to and from that city. Consequently the prizes had to be sunk, and the troops were obliged to proceed by way of Belgian territory.

According to the principles we have already set forth, it would be a violation of neutrality to transport armed forces over the portion of the Scheldt below Antwerp. And under the rules of The Hague a prize may be brought into a neutral port only on account of unseaworthiness, stress of weather, or want of fuel and provisions.<sup>2</sup> But a neutral Power may also allow prizes to enter its ports or roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court.<sup>3</sup> On the strength of the latter rule it might be contended that similarly a neutral Power may permit prizes to be navigated through its ports and roadsteads, especially so in the case of a roadstead connecting with the sea a belligerent country in whose waters the prizes were seized. However, as Holland refused to exercise her power with regard to the German merchantmen seized in Antwerp, although her neutrality would not necessarily have been affected if she had consented,<sup>4</sup> the duty of impartiality<sup>5</sup> imposed upon her would make it impossible for her to allow German warships to bring prizes taken at sea into that port (when occupied by

<sup>1</sup> Declaration of London, Article 18.

<sup>2</sup> Thirteenth Convention (1907), Article 21.—See *infra*, Chap. XVII (a).

<sup>3</sup> *Ibid.*, Article 28.—See *infra*, Chap. XVII (a).

<sup>4</sup> *Ibid.*, Article 10.

<sup>5</sup> *Ibid.*, Article 9.

German forces), or to permit the ingress of their warships into Antwerp, or the egress of naval expeditions fitted out in it.

It may be added that the belligerents in the present war appear to have recognized the Dutch control of the Scheldt. Soon after the war broke out Great Britain declared her intention to respect this guardianship and the rights implied therein; and we find that early in October the British Government requested that an unimpeded passage to Antwerp should be allowed to a hospital ship for the purpose of conveying wounded to England.

Had British warships been permitted to proceed to Antwerp before that city fell to the Germans, the course of the war might have been considerably modified. It has been held that Holland is not entitled to exclusive sovereignty over the mouth of the Scheldt, that Belgium possesses the right of co-sovereignty, and that therefore Great Britain, acting in defence of Belgium according to treaty obligations, was at liberty to despatch men-of-war to the Belgian port through the mouth of the river. Let us see whether such claims are tenable from the point of view of conventional law, no matter how justifiable they may be from the point of view of European policy. According to the principles of the law of nations regarding international rivers in general, the merchantmen of a State occupying the upper waters have a right of innocent passage in time of peace, and probably also in time of war. Whether this right is enjoyed regardless of convention by the merchantmen of all States, and not merely by those of the riparian States, is open to doubt. At all events, so far as Holland is concerned, she does not claim the right to exclude during war any merchantmen whatever; indeed, the redemption of the tolls in 1863<sup>1</sup> would make such a claim unjustifiable. As to foreign warships, too, there is a difference of opinion; but the predominating and the better view is—and it follows from general principles—that they may be legitimately excluded from terri-

<sup>1</sup> Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1582.



torial waters. But it is urged by opponents of Holland's claim that, though the common law of nations confers such a right on her, there are special treaties to be taken into account which supersede by their expressly written provisions the unwritten principles. Is this contention maintainable?

By the Treaty of Münster, 1648, the Scheldt was closed to the Belgic provinces; but the latter having passed in the early part of the eighteenth century to Austria, Joseph II made in 1784 a futile attempt to remove the barrier, which was again recognized by the Treaty of Fontainebleau (1785). In November 1792 the French invaded Belgium, and the French Convention by its decree declared the Scheldt to be free on the ground that "river courses are the common and inalienable property of all the countries irrigated by their waters; that a nation cannot, without injustice, claim the exclusive right of occupying the channel of a river and prevent the neighbouring peoples who inhabit its upper waters from enjoying the same advantage." In 1815 Belgium was united to Holland under the same sovereign, and the Treaty of Vienna declared the Scheldt free for purposes of commerce, subject to police regulations established by the consent of riparian States and uniformly applied to all merchantmen. Thus Article 108 said that "those States which are separated or traversed by the same navigable river engage to regulate, by common consent, all that regards the navigation of that river." Article 109 laid down that "navigation on all rivers indicated in the preceding article, from the point where each of them becomes navigable to its mouth, shall be entirely free, and cannot, in respect to commerce, be prohibited to anyone; it is understood, however, that one will conform to the police regulations, which shall be uniform for all and as favourable as possible to the commerce of all nations." When Belgium was created an independent and neutral kingdom by the treaty of 1839, the same principle was adopted, and various provisions were made for the joint superintendence of the river. In the large amount of correspondence that went on

relative to the separation of the two countries, the discussion was confined to securing to Belgium only commercial advantages.<sup>1</sup> Nothing in these arrangements was said about co-sovereignty; nothing was said about warships; nothing was said with an intention to deprive Holland of the right to take necessary measures of self-defence even though the closing of her territorial waters be thereby demanded. The essential point emphasized was that there should be no barrier to commercial navigation; and it was also stated expressly that Antwerp should be only a commercial port. Moreover, as Holland was not one of the guarantors of the neutrality of Belgium, she is not obliged to allow foreign warships to pass through her territorial waters for the purpose of protecting Belgium or for any other reason. The conclusion, then, to be drawn from all these considerations is that though exclusive sovereignty over the Scheldt cannot be claimed by Holland in respect of commercial navigation—seeing that the pilotage, buoying, maintenance of the channels below Antwerp, etc., were stipulated to be under a “surveillance commune” (joint supervision)—yet her sole sovereignty with regard to foreign men-of-war has not been impaired. Accordingly, the prohibitions enforced by the Dutch Government in reference to the warships of the present belligerents were legally justifiable.

<sup>1</sup> Cf. *British State Papers*, vol. xix. pp. 54, etc.; vol. xxvii, p. 990.

## CHAPTER XVII

### BELLIGERENTS AND NEUTRALS—INTERNMENT IN NEUTRAL COUNTRIES AND TERRITORIAL WATERS—AIRSHIPS OVER NEUTRAL TERRITORY—TRANSFER OF BELLIGERENT VESSELS TO NEUTRALS

(a) IN the previous chapter we saw the law of neutrality exemplified in different ways in the case of Holland. The rights and duties of neutral States come also into operation when their territories are crossed by individual members or masses of the armed forces of belligerents, whether fugitives, captured prisoners, or sick and wounded, and also when the survivors of sunk or shipwrecked warships are landed on their shores. So far as Holland is concerned, there have been instances in the present war of soldiers belonging to the combatants who accidentally or deliberately crossed over the Belgian boundary to Dutch territory, where they were interned, and instances of the survivors of naval vessels, for example, those of the *Aboukir*, who were landed on the Dutch coast. A number of survivors of the *Cap Trafalgar* were also landed in Argentina. A difference of treatment is to be noted. Those of the *Aboukir* were landed in Holland by neutral ships and were not interned, those of the *Cap Trafalgar* were landed in Argentina by a belligerent vessel and were interned there. The ground of distinction here appears to be scarcely adequate and justifiable. However, let us see what are the rules of international law on the subject.

With regard to large bodies of belligerent troops seeking asylum in neutral territory, a neutral State was not bound, under the common law of nations, and in the absence of

special conventions, to receive them ; but if it thought fit, it was entitled to allow them to remain if they submitted to be disarmed and interned during the remainder of the war. The conditions as to their reception and maintenance and also as to the reimbursement of expenses incurred by the neutral State were usually drawn up in a special Convention between the States concerned. A well-known example is that of 1871, when towards the end of the Franco-German War the wreck of General Bourbaki's army, some 85,000 French troops, tattered and famished, escaped over the Swiss frontier from the pursuit of General von Manteuffel. A convention was then entered into between their commander, General Clinchant (who had succeeded Bourbaki after the latter had shot himself), and the Swiss authorities, represented by General Herzog. The French army was admitted, on condition of giving up all arms, equipment, artillery-material, munitions of war (except the arms and horses of officers)—which were to be returned to the French Government on the conclusion of peace—and paying the expenses incurred by Switzerland. In the same war many French troops also entered Belgium, where they were disarmed and interned ; but Belgium made no stipulation as to indemnity for their maintenance. Similar measures were taken in the case of isolated refugees, or small numbers of them, but there was less formality, and less vigilance was exercised by the local authorities, whose obligations were not thought to be so stringent ; so that individuals after thus evading the pursuit of the enemy not infrequently returned to their homes or rejoined their forces. When prisoners of war were brought into neutral territory by troops seeking asylum, different practices obtained formerly ; some held that they, as well as the troops whose captives they were, should be interned, others held that they should regain their liberty. In 1871 Switzerland set free the Prussian prisoners brought by the French army, and restored to France an equal number of the French troops. As to the passage of the sick and wounded through neutral territory, there was no uniform rule. In 1870

Switzerland allowed German convoys of sick and wounded to pass through ; but Belgium refused. After the battle of Sedan, the German commanders being desirous of sending railway trains containing sick and wounded to Germany through Belgium and Luxemburg, the French Minister of War protested to the neutral Governments, and pointed out that this would free lines and enable the Germans to bring up men and ammunition. Belgium, therefore, refused to grant leave.

At the Hague Conference of 1899 more precise rules for the internment of belligerents and their wounded were drawn up. In 1907 they were readopted, in the fifth Convention, and a new regulation was added (Article 13). They are as follows:—

ARTICLE 11.—A neutral Power which receives on its territory belligerent armies shall intern them, as far as possible, at a distance from the theatre of war. It may keep them in camps, and even confine them in fortresses, or in places assigned for this purpose. It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without permission.

ARTICLE 12.—In the absence of a special agreement to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief prescribed by humanity. At the conclusion of peace the expenses caused by the internment shall be made good.

ARTICLE 13.—A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence. The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

ARTICLE 14.—A neutral Power may authorize the passage over its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case the neutral Power is bound to adopt such measures of safety and control as may be necessary for the purpose.

The wounded or sick of one belligerent brought under these conditions into neutral territory by the other belligerent must be guarded by the neutral Power, so as to ensure their not taking part again in the operations of war. The same duty shall devolve on the neutral Power with respect to wounded or sick of the other army who may be committed to its care. •

ARTICLE 15.—The Geneva Convention applies to sick and wounded interned in neutral territory.

We see from the purport of the above regulations that a neutral State is not obliged to admit belligerent fugitives or wounded; but if it does so then the duty of impartiality applies, and it must therefore treat in the same manner the fugitives and wounded belonging to the other combatant. Should belligerent troops, even if they have prisoners in their possession, cross over by mistake into neutral territory, they ought strictly to be allowed to depart at once.

With regard to internment in the case of naval warfare, the above principles, in the main, apply, subject to such modifications as are necessitated by the different circumstances. We have already referred<sup>1</sup> to the rights and obligations of neutral maritime States in reference to the visit and sojourn of belligerent warships in their ports and waters. Four other Articles of the thirteenth Convention, 1907, are here relevant :—

ARTICLE 21.—A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew. •

ARTICLE 22.—A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in the preceding Article.

ARTICLE 23.—A neutral Power may allow prizes to enter

<sup>1</sup> *Supra*, Chapter XV (a).

its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

ARTICLE 24.—If, notwithstanding the notification of the neutral Powers, a belligerent warship does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea during the war, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained. The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be subjected to such restrictions as it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board. The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

The remaining rules governing internment concern the sick, wounded, or shipwrecked, and are given in the tenth Convention (1907).

ARTICLE 12.—Any warship belonging to a belligerent may demand the surrender of the wounded, sick, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, and boats, whatever the nationality of such vessels.

ARTICLE 13.—If wounded, sick, or shipwrecked persons are taken on board a neutral warship, every possible precaution must be taken that they do not again take part in the operations of war.

ARTICLE 15.—The shipwrecked, wounded or sick [of belligerents] who are landed at a neutral port with the consent of the local authorities, must, in default of an

arrangement to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them from again taking part in the operations of the war. The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, wounded, or sick persons belong.

It follows from the above that sick, wounded, or shipwrecked persons of belligerents taken on board a neutral warship are not to be given up, and their surrender cannot be demanded; they should therefore be detained, interned, or paroled, as in the case of land forces retreating into neutral territory. A neutral warship, but not a neutral merchantmen or other kind of vessel, is put into a position analogous to that of neutral territory which enjoys inviolability. It is to be noted that, on a strict interpretation, the expression "landed" (*débarqués*) in the Article last cited may well be held to be inapplicable to the case of men who swim to shore, or escape from a wreck. Further, the Article appears to imply that the landing of shipwrecked or disabled men will be effected by ships of their own State: so that if they should be landed by a neutral vessel, the provision laid down in the Article does not apply. The Dutch Government recognized this difference, and accordingly liberated the British survivors who had been landed in Holland by neutral vessels; and having seen fit to adopt this course, the Dutch Government would be obliged to act similarly in the case of seamen of the other belligerents placed in the like circumstances. Had they been taken on board a neutral warship, they could not have been released, by reason of the requirement of Article 13. A German warship, however, might have intercepted the neutral vessel that picked them up, and properly demanded their surrender in accordance with Article 12; but it could not have intercepted in the same manner a neutral warship, which, being subject to its own State's jurisdiction, is not liable to visit and search. The troops that crossed over from Belgium into Holland have to be interned for the period of the war; whilst the shipwrecked landed in Dutch



ports by neutral vessels were set free. The underlying ground of this difference of treatment is presumably the fact that in the first case the combatants voluntarily sought an inviolable asylum, whereas in the second case the combatants were taken to neutral territory<sup>\*</sup> without their consent (though not necessarily contrary to their wishes).

(b) Next we have to deal briefly with the question of airships flying over neutral territory. This is the first war in the history of mankind in which airships have been used systematically and with great effect.

Only a short time ago few persons could have foreseen the great possibilities of air locomotion, and the amazingly rapid development of dirigible balloons, aeroplanes, man-raising kites, and flying-machines of all kinds. Just as the invention of gunpowder radically altered the character of warfare, so has the invention of aircraft already affected to a large extent the nature of modern wars. And with the gradual introduction of greater improvements in these monsters of the air, the methods of belligerent operations, as we have been accustomed to understand them, will fall into disuse, and the entire art of war will be revolutionized. Already we find that there is less scope now than ever before for commanders to avail themselves of the long established principles of military science, or to execute unseen movements and suddenly to surprise the enemy by an ingeniously contrived plan of strategy and tactics. What with the enormous potentiality of air-machines, future wars will be transformed into mere contests of mechanical science and nerve. And it is not too much to say that this new arm, thought only a little while ago to be simply a useful auxiliary, will become the predominating one, so that to its demands and applications all other practices of warfare will inevitably have to be adapted.

For war on land as well as for war on sea a large number of clearly defined laws, provisions, and usages have already been established; and all those may be referred, ultimately, to a few fundamental principles that seem self-evident to

the universal sense of mankind. But the air-space presents to us an entirely different region, a new element to which the existing rules of war can scarcely apply. Indeed, one of the most vital fundamental principles, which will necessarily govern the establishment of a body of regulations for aerial navigation in time of war and in time of peace, is itself by no means universally admitted—namely, the sovereignty and ownership of the air and the air-space.

According to the theory of our national law, and that of other States, he who is the owner of a piece of land possesses also proprietary rights in the column of air lying above it, to an indefinite extent. "*Cujus est solum ejus est usque ad cœlum.*" In like manner it is maintained by many jurists and publicists that the air-space above a particular country is owned absolutely by that State, which is therefore indubitably entitled to regulate all navigation therein, to prevent, if it thinks fit, foreign subjects from making use of it, and punish unauthorized incursions into it as trespasses, on the ground that they are interferences with the rights of exclusive dominion. Others hold that the air is free altogether. Others, again, contend that the aerial region is comparable to the ocean, so that a State may exercise sovereignty only over a certain portion, namely, "the territorial air," as in the case of the territorial waters, the remainder being common to all nations, and not susceptible of exclusive proprietorship. Conformably to the latter view the aerial space is divided into a lower zone (the territorial section) and an upper zone (the open free section), the lower reaching to a height, say, of three or four hundred yards in the opinion of some, to five or six hundred, or even to the range of cannon shot in the opinion of others. But modern guns have a vertical range of very great extent. Hence in any case the alleged freedom of the upper zone is for practical purposes illusory. Indeed, the comparison with the zone of territorial waters and the indefinite zone beyond, namely, the open sea, is really untenable. It is idle and futile to attempt to base regula-

tions on a comparison between the horizontal expanse of the earth's waters with the vertical extension of the air-belt. The more distant a formidable object is from our coast and our territorial waters, the less need there is for us to exercise control over it, so far as the security of our territory is concerned. But we cannot, obviously, say that the higher an airship is above our country's surface and the lower zone of air, the less dangerous it is to us, and the less need there is for us to exercise control over it. Indeed, it is just the contrary. The higher it flies, the more dangerous it becomes to us by reason of its increasing potentiality to injure us; therefore, the greater the necessity to regulate its navigation. Moreover, the line of demarcation between the high sea and the territorial waters can be pretty clearly defined; but such sharp division between the upper aerial zone and the lower is impossible. How is a belligerent airman to be guided, so that he may be able to keep out of the neutral territorial air and limit his movements to the upper air? What sanction can be invoked to compel him to respect a boundary that can scarcely be imagined, to say nothing of the impossibility to define it for practical purposes? We must consequently abandon all attempts to make such a division.

Two other courses remain open to us: either to reject all claims of sovereignty over any section of the air-space, or to assert sovereignty over all the air and air-space above our country. It is manifest that the first alternative cannot possibly be accepted; for its adoption would mean nothing less than exposing ourselves to great danger and possible destruction. In 1906 the Institute of International Law, which, though not empowered to make law, has rendered inestimable service in preparing the way for the labours of the great international law-making conferences, adopted this resolution: "The air is free. In time of peace and in time of war States have over it only the rights necessary for their self-preservation." With regard to this proposition, we may say in the first place that the latter portion of it is really in contradiction to the former; and secondly

that the whole declaration is in conflict with the universally felt needs of air navigation of to-day, and with the restrictions that it has been found necessary to impose on the use of wireless telegraphy by belligerents in neutral zones. Accordingly, the second alternative is the only admissible one. And it is this view that has been generally recognized, and adopted in the recent legislation of several States, for example, Great Britain, France, Russia.

From the above considerations, and especially from the fundamental principle of complete sovereignty, we may conclude that in case of war, belligerent airmen may be excluded by a neutral State from the entire air-space over its territory and over its territorial waters, subject to the right of asylum for a limited period for the purpose of executing small repairs and taking in a limited amount of oil and provisions. Should they remain beyond the given period, they and their aircraft ought to be interned till the conclusion of the war. The neutral's duty of impartiality will apply here as elsewhere ; hence whatever concessions are granted, whatever regulations are made, and whatever restrictions are imposed must apply equally to all belligerents. Airmen who have been duly commissioned by their Government are entitled, if captured by the adversary, to be treated as prisoners of war. But those who proceed in a clandestine manner or on false pretences in order to obtain information in the zone of operations—territorial, naval, or aerial—of a belligerent with a view to communicating it to his enemy, are guilty of espionage and therefore are liable, if captured, to the extreme penalty of the captor's martial law.

Though the question of air navigation may perhaps be regarded more or less as an open one from the point of view of international law, there is little doubt that when a Convention comes to be made on the subject the principles enunciated above will be embodied in it as a basis for more detailed regulations. It appears that some of these principles were applied in one or two instances that occurred during the war. Thus, British military airmen in their proceedings against the enemy flew over Swiss

territory on one occasion. Thereupon the Swiss Government, without taking any account of the impracticable distinction between upper and lower aerial zones, made a formal protest to the British Government against this violation of their neutrality. The British authorities manifested their intention to respect such claims of neutral States, and accordingly issued instructions to the airmen, who were engaged in operations against the Zeppelin factory at Friedrichshaven, to the effect that they should avoid flying over Swiss territory. But the British Note pointed out that airmen involuntarily or inadvertently crossing, in the course of their flight, into the neutral zone cannot be regarded, in the present conditions of aerial navigation, as violating neutral rights. This argument is perfectly justifiable on principle. It is akin to the contention we advanced in an earlier part of this chapter, that belligerent troops crossing over by mistake into neutral territory ought not to be interned if they are prepared to depart therefrom immediately. The element of *voluntas* is absent in such circumstances. Consequently, if there is no breach of neutrality or liability to internment in the case of an involuntary or inadvertent divergence into neutral territory, *a fortiori* there is no violation of neutral rights in the case of a similar divergence into neutral air-space—for in flight it is obviously much more difficult to distinguish the boundaries between adjacent States.

Again, during the night of January 19–20, 1915, the German airships, after their raiding enterprise on the Norfolk coast, returned apparently by way of Dutch territory. Accordingly, the Netherlands Government instructed their Minister at Berlin to ask the German Government to make inquiries as to the alleged violation by the airmen of Dutch neutrality.

(c) Another question concerning the relationships of belligerents and neutrals is the transfer of vessels by the former to the latter. Remarkable examples of transactions of this kind occurred in the present war, when the German

warships, the Goeben and the Breslau, were transferred to Turkey (at the time a neutral), and German merchantmen were transferred to the United States flag.

According to the Anglo-American practice, before the Declaration of London, the transfer of a warship by a belligerent to a neutral during the war was considered to be invalid, even if the transfer took place in a neutral port and after the vessel had been dismantled.<sup>1</sup> Therefore, such vessel, though purchased in good faith and afterwards fitted up as a merchantman, was liable to capture by the other belligerent at any time during the continuance of hostilities.<sup>2</sup> The transfer of belligerent merchantmen to a neutral was regarded as valid, if it was absolute, if it was made in good faith, and attested by satisfactory evidence,<sup>3</sup> whether the transaction took place during war or in contemplation of it, and whether the vessel was lying in an enemy port or in a neutral port. The mere non-payment of part of the price or the taking of a lien on the ship or the freight for a part of the price was not in itself evidence that the vendor had not divested himself of his interest in the ship.<sup>4</sup> By way of illustration one interesting case may be referred to. During the Crimean War, a Russian merchantman having been transferred to the Danish flag was captured by Great Britain, and her condemnation was demanded on the ground that the transfer was invalid. To decide this point the Prize Court asked two questions: (1) Had there been a genuine and absolute sale of the vessel to the Danish subject without any fraud or collusion? (2) Did any interest in the ship remain in the seller at the time of capture? The answers were in favour of the purchaser, and so, though the transaction had clearly been effected in contemplation of war, an order was made for the vessel to be restored to him.<sup>5</sup> On the contrary, if any

<sup>1</sup> *The Minerva*, 6 C. Rob. 396.

<sup>2</sup> *The Georgia*, 7 Wallace 82.

<sup>3</sup> *The Baltica*, 11 Moo. P. C. 141; *The Benedict*, Spinks 314; *The Rapid*, Spinks 80.

<sup>4</sup> *The Ariel*, 11 Moo. P. C. 129; *The Sechs Geschwistern*, 4 C. Rob. 100.

<sup>5</sup> *The Ariel*, as above.

interest in the vessel remained in the vendor, if there was an understanding to retransfer her at the end of the war, if the transaction took place in a blockaded port,<sup>1</sup> or if the purchaser entered into the transaction in the course of the voyage without taking actual possession, then the ship was liable to capture and condemnation. The onus of establishing the genuine character of the transfer was on the claimant.<sup>2</sup>

For a long time there was no uniformity in the opinion and practice of States. Thus Spain adopted, with certain modifications, the Anglo-American practice. Holland condemned vessels only if they were sold in a blockaded port. France and Russia required transfers to be unconditional, and to have been effected before the war.<sup>3</sup> An attempt to arrive at unanimity was made by the Naval Conference of 1908-9, and the points agreed upon are found in Articles 55 and 56 of the Declaration of London, which adopted, with certain qualifications, the principles underlying the Anglo-American practice. The rules laid down are as follows :—

ARTICLE 55.—The transfer of an enemy vessel to a neutral flag, effected before the outbreak of war, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel as such is exposed. There is, however, a presumption that the transfer is void if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the war began. This presumption may be rebutted. Where the transfer was effected more than thirty days before the war, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits arising from her employment do not remain in the same

<sup>1</sup> *The General Hamilton*, 6 C. Rob. 62.

<sup>2</sup> Cf. the Memorandum prepared for the use of the British Delegates at the London Naval Conference (*Parliamentary Papers*, 1909, *Miscell.* No. 4).

<sup>3</sup> Cf. *Parliamentary Papers* (1909), *Miscell.* No. 5, pp. 27, 52, 81, 56.

hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

ARTICLE 56.—The transfer of an enemy vessel to a neutral flag, effected after the outbreak of war, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, an absolute presumption that a transfer is void :—(1) If the transfer has been made during a voyage or in a blockaded port ; (2) if a right to repurchase or recover the vessel is reserved to the vendor ; (3) if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

With regard to the transfer of the Goeben and the Breslau, it may be pointed out that the German Government made an attempt to sell the former to Turkey in 1912. The offer was then refused on the ground that the Turkish naval officers were then insufficiently experienced to take charge of such complicated mechanisms. When they were alleged to have been sold to the Ottoman Government in the middle of August, the transfer bore all the characteristics of a palpably fraudulent transaction. In any case, even though it were genuine and the conveyance absolute, and even though the German officers and crew were dismissed, the validity of the sale would still be questionable. Apart from the Declaration of London—to which Germany assented, though Turkey did not—a transfer of a belligerent warship to a neutral, effected for the purpose of escaping from consequences to which the vessel was exposed, has for a long time been held to be illegitimate. And in the present case the Goeben and the Breslau were flying<sup>3</sup> from their pursuers. Moreover, such purchase by a neutral would amount to unneutral service, as it would involve the payment of an enormous sum to the belligerent Government. No account can be taken of the fact that the sum agreed upon entailed a considerable pecuniary loss to Germany ; nor can account be



taken of the fact that the German naval forces were thereby largely reduced for the rest of the war—for the transfer was not made voluntarily, but rather under compulsion consequent on the pursuit by British warships. Had no transfer taken place, the Goeben and the Breslau would have had to be interned until the end of the war, or they would have been compelled to come out of Turkish territorial waters and face the British fleet, which, owing to superior strength, would undoubtedly have destroyed them. In the case of either of these alternatives Germany would have suffered a naval loss, without receiving any pecuniary compensation. But to transfer the vessels would necessarily be followed by the payment of a large sum, which would enure to the aid of Germany, and therefore would constitute an unneutral service. Thus, either a genuine conveyance of the vessels in question followed by payment, or a fraudulent conveyance of them to Turkey (which was actually the case), would equally be a violation of international law on the part of Turkey, which was then neutral. According to modern doctrine and practice, a State is either neutral or unneutral. The older distinctions of "armed," "favourable," "qualified," or "benevolent" neutrality are now devoid of legal force. A neutral Power coming to the aid of one belligerent that finds itself in difficulties, owing to the legitimate operations of the other belligerent, cannot properly be regarded as fulfilling the obligations of neutrality, even though some advantage may thereby accrue to the neutral. We may add that notwithstanding all the objections that could be urged against the alleged sale by the adversaries of Germany, the Russian Government undertook to offer no protest against it, provided Turkey fulfilled her promise to replace the German officers and crew by her own subjects.

Next we come to the transfer of German merchantmen to the United States flag. Here, too, the above arguments apply, and in some respects with still greater force—for in the case of merchantmen it is easier to make use of the neutral flag as a mere blind. In order to fulfil the last condition of Article 56 of the Declaration of London, the

Congress of the United States attempted to pass a Bill for facilitating and validating such transactions. Such a proceeding would be admissible if the proposed transfers were otherwise legitimate; the first condition of the said article must first of all be fulfilled. Obviously, therefore, an Act of Congress could not possibly render valid the transfer of such vessels as had sought the neutral flag in order to evade the consequences to which they were exposed. In these circumstances the cruisers of Germany's adversaries could not properly be called upon to respect them, when encountered on the high sea. It appears, however, that Great Britain, whilst reserving her right to protest on principle, was prepared to waive her legal rights and recognize the contemplated transfers on condition that the vessels thus acquired by the United States would, during the war, be confined to indisputably neutral trade—for example, with Latin America, and possibly with Great Britain and France.

On the other hand it was proposed in America that the United States Government should themselves become the purchasers of the German merchantmen lying in their ports. The adoption of this proposal would manifestly create very great difficulties. If, as Government ships, they sailed afterwards under the American naval flag, they would claim immunity from visit and search by belligerent cruisers. But visit and search would be justified, if it were suspected on good grounds that they were engaged in contraband trade or unneutral service; and if such interception were insisted on it might well be construed as an act of war against the United States. Again, such purchase would mean the payment of a large sum of money; and this payment coming from a neutral Government to a belligerent's subjects (who would no doubt utilize the proceeds for the prosecution of the war) would practically constitute an infringement of the obligations of strict and honesty neutrality, for the same reasons as appeared in the (pretended) purchase of the German warships by Turkey. The United States Government decided that a suggested loan to France by American subjects for the purpose of

buying provisions in America would be incompatible with the maintenance of a faithful neutrality. But we fail to see that the payment of an enormous sum of public money for vessels that the Germans were prevented from using through the operations of their opponents would be less incompatible with it. No wonder, then, that France protested against the proposed purchase.

In the latter part of October legal proceedings were instituted before the Prize Court of Halifax (Nova Scotia) for the condemnation of the American oil-tank steamship *Brindilla*, on the ground that she was transferred to the American Registry by German owners in contravention of Article 56 of the Declaration of London. The United States authorities held that the seizure was indefensible, as the vessel belonged to the Standard Oil Company, even when she flew the German flag. Now it has long been an established rule of the law of nations—especially so of Anglo-American practice—that the character of the vessel depends on the nationality of the flag. This principle was laid down emphatically in 1803<sup>1</sup> by Sir W. Scott (afterwards Lord Stowell). During the war with Holland a vessel sailing under the Dutch flag was captured by the British; but a German merchant resident at Bremeut claimed her as his property, and opposed her condemnation, though unsuccessfully. The same view was adopted in the Declaration of London, of which Article 57 says that subject to the provisions respecting transfers (which have been given above) the neutral or enemy character of a vessel is determined by the flag she is 'entitled to fly. Thus the London Naval Conference accepted the old test of the flag, subject to the captor's right to disprove the alleged title to use it. This right to fly a particular flag depends on the national law of the flag's State.<sup>2</sup>

The transfer of the *Dacia*—a unit of the Hamburg-American fleet, which had been sheltering at Port Arthur,

<sup>1</sup> *The Vrow Elizabeth*, 5 Q. Rob. 2.

<sup>2</sup> See the cases of *The Tommi* and *The Rothersand*, that came before the present Prize Court, *infra*, Chap. XIX.

Texas, since July 28—to an American citizen of German extraction, and her admission to the American Registry, aroused a great deal of attention. The purchaser at first intended that she should proceed to Bremen direct with a cargo of cotton; and had she been allowed to pass, it was thought that the precedent would have affected all the other German liners sheltering in American ports since the outbreak of the war. Afterwards Rotterdam was chosen as her probable destination. But the British Government refused to recognize the transfer, and intimated that the vessel would be liable to seizure, if bound either for a German port or for Rotterdam, which is from a geographical point of view virtually a German port. In some quarters it was suggested that a compromise should be effected whereby the *Dacia*—as the vessel, and not the cargo, was in question—might be allowed to sail to Rotterdam, unload her cargo, and then return to a British port to await the decision of the Prize Court. However, the vessel, having at last started her voyage, was eventually captured by a French cruiser and taken into Brest for adjudication. According to French practice her condemnation would, in the circumstances, be decreed.

Having regard to all these questions it is clear that conflicts between belligerent and neutral interests are inevitable. So far as Great Britain, France, and the United States are concerned, such conflicts have already been provided for to a large extent by the establishment of treaties setting up permanent Joint Commissions which will, on their own initiative, investigate disputes (for example, such as may arise out of the right of search, seizure, etc.), and keep them for a year from diplomatic channels, until the parties involved have had time to “cool off.” These Anglo-American and Franco-American Peace\*Commission treaties were signed on September 15. Germany refused to enter into a similar undertaking with the United States. The Joint Commission is to consist of five members, one nominated by each of the two signatory States from its own subjects, one nominated by each from the subjects of

another Power, and the fifth to be agreed upon by the two States and chosen from the subjects of a neutral Power. The report of the Commission will not necessarily bind the parties to the dispute; but no doubt it will be found to possess sufficient weight to enable them to adjust their differences amicably, and so avoid the possibility of bringing into existence such crises as were produced by the Trent and Alabama affairs.

## CHAPTER XVIII

### BELLIGERENTS AND NEUTRALS — DECLARATION OF LONDON—CONTRABAND—RIGHT OF SEARCH—EQUITABLE RELAXATIONS—THE AMERICAN AND BRITISH NOTES—FOODSTUFFS UNDER GOVERNMENT CONTROL

(a) THE London Naval Conference of 1908-9 may be regarded as a natural sequel of and supplement to the Hague Conferences of 1899 and 1907. Many questions had been discussed at The Hague on which no agreement had been arrived at; many other matters that remained uncertain and lacked uniformity in practice were not brought before the delegates at all. This was the case particularly in the sphere of international maritime law. Accordingly at the invitation of Great Britain the chief maritime Powers of the world sent delegates to London with a view to settling numerous difficulties relating to naval war. Ten important subjects were deliberated on; agreement was reached on eight of them, it was found impossible to obtain unanimity on one, and on the remaining subject the provisions drawn up were admittedly incomplete. On the whole, however, the Declaration of London, a code of seventy-one articles, was considered in all parts of the world—though less so in Great Britain—as a progressive achievement, whereby the rights of neutrals and belligerents as regards neutral commerce were more definitely regulated, with a leaning in favour of neutrals. The subjects dealt with, in the order of treatment, are blockade, contraband of war, continuous voyage, unneutral service, the destruction of neutral prizes, the transfer of vessels to a neutral flag, enemy character, and convoy.

The Declaration of London had been perhaps too rapidly formulated ; it possessed too much the character of a diplomatic compromise ; and many of its critics in Great Britain maintained that the British delegates had hurriedly and unwisely abandoned many rights that Great Britain had long insisted on and enforced in maritime war. Moreover, it had not been sufficiently foreseen that the nature, conditions, methods, and implements of modern warfare were changing almost from day to day ; and so in several particulars, notably with regard to the determination of contraband articles, provisions were laid down which might fail to meet the urgent requirements of belligerents (especially those with powerful naval fleets) in the very first war that might break out. In this respect, Great Britain was, naturally, affected more than any other State ; and a strong movement was in consequence set on foot in this country to prevent the ratification of the London Declaration, and to re-assert the former law of naval war as recognized, for the most part, in Anglo-American doctrines and practice.

The production, then, of the Naval Conference was not ratified by Parliament ; and certain other States, for example the Balkan Powers, had not notified their adhesion to it. Article 66 says that the signatory Powers undertake to ensure the observance of its rules in any war in which all the belligerents are parties thereto. Strictly speaking, therefore, the Declaration of London as such never possessed any legal validity, as it was not ratified, not by a minor member of the family of States, but by the most powerful naval Power in the world. However, as it was taken to be at the time an expression of international consensus of opinion, and seeing that by far the greater part of it was admittedly an express formulation, in a more definite and a more logically arranged manner, of old-established rules, it would be unreasonable—if not illegitimate—to repudiate it entirely or substantially, even though it had not been ratified. In this respect the difficulty is increased by Article 65, which says that the provisions of

the Declaration must be treated as a whole, and are not to be separated. It is worthy of note that in the Turco-Italian War and in the Balkan conflict, it was adopted even by States that had not been signatory parties to it. At the outbreak of the present war Austria notified her intention, in her hostilities against Serbia, to apply its rules with respect to neutral shipping. France and Russia intimated that they proposed to act during the war in conformity with its provisions so far as possible—that is to say, reserving to themselves the right to introduce such modifications from time to time as they found necessary.

Owing to the unprecedented character of the present conflict, its extraordinary proportions and striking novelties, the British Government found it impossible to accept the Declaration of London as an undivided whole, and so adopted it subject to certain additions and modifications demanded by particular circumstances. An Order in Council, issued in the latter part of August, stated, as a reason for this step, that it was desirable that the operations of the allied fleets, so far as they might affect neutral ships and commerce, should be conducted on similar principles. It appears, therefore, that the adoption of the Declaration of London—subject to such departures as may be found indispensable—together with the official Report that originally accompanied it as a commentary, is only provisional. But previous wars have shown that rules introduced provisionally tend to become permanent, at all events to survive the occasion for which they were introduced. Thus, till the middle of the nineteenth century there was no general custom or uniform international practice with regard to the treatment of neutral goods on enemy vessels, and enemy goods on neutral vessels. One principle was usually acted on by Great Britain and United States, another by France, Spain, Holland, and other countries, and even then subject to variations demanded by different circumstances. During the Crimean War (1854), Great Britain and France, as allies, found it neces-



sary to adopt common measures with regard to maritime capture. An arrangement was therefore made between them whereby Great Britain abandoned her right to seize enemy goods on neutral ships, and France agreed to respect neutral goods on enemy ships. At the conclusion of the war this compromise between conflicting practices was, together with other rules, accepted also by Russia, Prussia, Austria, and Turkey, and was embodied in the Declaration of Paris, 1856, which eventually obtained the adherence of nearly all the Powers.

By a quick succession of Proclamations and Orders in Council, several modifications of the Declaration of London were soon introduced. The belligerent rights against neutral commerce and contraband trading were considerably increased. Under the Declaration of London,<sup>1</sup> balloons, flying machines, their distinctive component parts and their accessories are conditional contraband—that is, are liable to capture if it is shown that they are destined for the enemy Government or their armed forces; but by the Proclamation issued immediately on the outbreak of the war (August 4)<sup>2</sup> these articles were declared absolute contraband—that is, liable to capture if shown to be destined either to the armed forces of the enemy or to any territory belonging to or occupied by the enemy. During the five years that have elapsed since the Declaration of London was drawn up, aerial navigation and aircraft appliances have developed to such an extent that the change made is amply justified. The Declaration of London laid down that a vessel should not be captured, on the ground that she has carried contraband on a previous voyage, if the carriage is at an end.<sup>3</sup> In earlier practice it was generally considered that when the contraband goods had been discharged, the liability for carrying them ceased.<sup>4</sup> But it was also held that a vessel that had successfully

<sup>1</sup> Article 24, § 8.

<sup>2</sup> *Manual of Emergency Legislation*, p. 108.

<sup>3</sup> Article 88.

<sup>4</sup> *The Frederick Molke*, 1 C. Rob. 86; *The Imina*, 8 C. Rob. 168.

carried contraband on the outward voyage, with false papers and by fraud, might be condemned if seized on her return voyage.<sup>1</sup> The question of the determination of conditional contraband had in 1909, and in 1911 on the occasion of the Naval Prize Bill (the object of which was to introduce into English prize law the rules of the Declaration of London), aroused a great deal of controversy. It was contended that in the case of conditional contraband the presumptions of destination to the enemy's forces or to a department of the enemy Government as set up by the Declaration<sup>2</sup> were too vague; the presumptions therein stated are a consignment to the enemy authorities, or to a trader established in the enemy country when it is well known that he supplies such goods to the enemy, also a consignment to a fortified place of the enemy or to another place serving as a base for his armed forces. The Order in Council of August 20,<sup>3</sup> without making these presumptions clearer, added two other kinds of hostile destination, namely, a consignment to or for an agent of the enemy State, and a consignment "to a merchant or other person under the control of the authorities of the enemy State." It is obvious that these words are sufficiently general in their applicability to cover any consignee in the enemy country or occupied territory, if the authorities there have assumed the power to direct the general distribution of such supplies as are useful for the armed forces as well as for the civil population. Further, the Declaration did not apply the doctrine of continuous voyage to conditional contraband<sup>4</sup>; that is, conditional contraband which is not to be discharged at an intervening neutral port is not liable to capture, unless it is found on board a vessel bound for territory belonging to or occupied by the enemy. But the rule to be enforced by his Majesty's Government expressly applies the doctrine to the less objectionable species of

<sup>1</sup> *The Margaret*, 1 Acton 888; *The Nancy*, 8 Rob. 122.

<sup>2</sup> Article 84.

<sup>3</sup> *Manual of Emergency Legislation*, p. 148.

<sup>4</sup> Article 85.

contraband trading, so that a cargo is liable to seizure if it appears that it is to be forwarded for the use of the enemy forces, although the vessel is bound for a neutral port and is to discharge at a neutral port. Conformably to the rule, therefore, a cargo, say, of foodstuffs on a neutral vessel bound for a neutral port—for example, Rotterdam—may be seized by a British cruiser, if the ship's papers show that it is consigned to a fortified place, or base of operations of the enemy, or to an agent of the enemy Government, or any person whatever that is under their control.

Further, alterations as to contraband, "destination" of goods, and blockade were made by the Order in Council of August 20.<sup>1</sup> Fresh lists of absolute and conditional contraband were announced, and new modifications of the Declaration of London made by the Order in Council of October 29. The rights of belligerents were thereby once more enlarged, though there was no doubt that protests from neutral Powers would be made. Here, again, the changes were on principle justified; for in 1909 the Declaration of London had failed to take account of various commodities and instruments of locomotion which came to play an important part in belligerent preparations or in the conduct of actual warfare. Accordingly, the British Government included in the new list of absolute contraband such articles as motor tyres, rubber, mineral oils, motor spirit, as well as iron ore, nickel ore, unwrought copper, and other metals that are compounded into explosives. To the number of conditional contraband goods were added hides, pigskin, and leather suitable for saddlery, harness, or military boots. With regard to the question of destination, it is declared that conditional contraband—absolute contraband was no doubt intended to be included, too—would be seizable on board a vessel bound for a neutral port, if the goods were consigned "to order," or if the ship's papers did not indicate who the consignee was, or if they showed that the consignee was in territory belonging to or occupied by

<sup>1</sup> *Manual of Emergency Legislation*, p. 148.

the enemy. In all these cases the owners of the goods would not be able to sustain this claim, unless they satisfactorily proved an innocent destination. Thus the doctrine of continuous transport was to be applied in such a way as to empower a belligerent to capture cargoes on suspicion of further transport. It was also laid down that in case it were proved that a neutral country was sending supplies to an enemy Government, a direction might be given that Article 35 of the Declaration was not to apply to ships bound for a port of that country ; that is to say, contraband goods, either absolute or conditional, bound for that country would be liable to capture. Again, a neutral vessel having sailed to an enemy port when her papers indicated a neutral destination was made liable to capture on her return voyage.<sup>1</sup> There is no need to trace here the subsequent changes that were made in reference to contraband. The above will suffice to show how some of the more important principles were adapted to actual requirements, as and when they arose.

We may add here that with regard to the practice of Russia, an Imperial ukase, September 14, 1914—following the lines of the British regulations—ordered that in the present war the rules of naval warfare contained in the Declaration of London were to be observed by the Russian fleet, but subject to certain modifications. For example, airships and apparatus for aviation, their parts, accessories, and materials designed for aircraft, were to be considered absolute contraband. A neutral vessel that has conveyed contraband to the enemy\* with false documents was made liable to seizure, if she was encountered before the conclusion of the return voyage. Conditional contraband goods despatched to an agent of the hostile State or to a merchant or party in its employ were to be regarded as destined for the military forces or the administration of the hostile State, and therefore liable to capture. Goods of this kind intended for such destination were seizable, no matter to what port the vessel was proceeding.

<sup>1</sup> *Manual of Emergency Legislation*, Supplem. No. 2, p. 78.

In view of these modifications of the Declaration of London—and some of them, as we have seen, were undoubtedly drastic—it is not surprising that protests were made against them not only by the enemy, but also by some neutral countries. In the latter part of October, the German Government addressed to neutral States a Memorandum animadverting on the attitude of Great Britain and France towards the Declaration of London. It was urged that the various modifications and additions announced by Great Britain in August co-operated to nullify the essential features of the Declaration, and constituted a violation of existing international law; and that the changes introduced by the British Proclamation of September 21 made matters still worse, especially in regard to the regulations governing conditional contraband. The German Government, therefore, inquired what attitude the neutral Governments intended to assume in view of this procedure on the part of Great Britain and France.

In a later memorandum, dated Berlin, February 4, 1915, in which Germany intimated her resolution to adopt retaliatory measures, she declared that though the British Government had announced that the London Declaration was to be binding on their naval forces, they actually denounced the Declaration in its most important provisions, despite the fact that the British delegates at the London Conference recognized the legal validity of the conclusions arrived at. Complaint was made, too, that his Majesty's Government had included in the list of contraband a number of articles, which are not or at most are only indirectly useful for military purposes, and which, therefore, according to the London Declaration, as well as by the universally recognized rules of international law, may not be designated contraband. Further, it was alleged that Great Britain had virtually abolished the distinction between absolute and relative contraband, inasmuch as she captured relative contraband goods intended for Germany, without reference to the port in which they were to be unloaded, or to the hostile or peaceful use to which they were to be put.

The United States also protested<sup>1</sup> against the extension of belligerent rights over neutral commerce. For example, two American oil vessels, the *Platuria* and the *J. D. Rockefeller*, belonging to the Standard Oil Company, were seized by British cruisers on suspicion that, though bound for neutral ports, the ultimate destination of the oil was in all probability the forces of the enemy. Shortly afterwards, however, the British Ambassador at Washington notified the State Department that the *J. D. Rockefeller* was released, on the ground that the cargo was destined for Denmark, which had already placed an embargo upon the re-exportation of oil.

Sweden, too, being seriously affected by the inclusion of copper and iron ores in the class of contraband, protested. The Swedish Government complained that by Article 28 of the Declaration of London metallic ores were placed in the free list, and therefore were not liable to be declared contraband at all. No doubt iron ore is a substance used largely by the civil population for innocent purposes; but when commodities like wrought iron and wrought copper, which are readily susceptible of adaptation to warlike uses, are destined for the enemy's forces, their seizure is justifiable, no matter who may be the nominal consignee.

Holland complained of the treatment of conditional contraband goods consigned to her ports. Now Germany drew enormous supplies from Rotterdam, and owing to the Rhine Acts (to which we have already referred) the Dutch Government could not interfere with merchantmen taking cargoes to Germany by river or through bills of lading. It is true that international law imposes no obligation on a neutral Government to prevent their subjects from engaging in contraband trade<sup>2</sup>; but it does impose an obligation on a neutral State to prevent the use of its territory as a regular base of supplies for the forces of a combatant—for to authorize such conduct or to connive at it would be tantamount to

<sup>1</sup> See, too, *infra*, at the end of this chapter.

<sup>2</sup> Cf. H. C. (1907), No. v, Article 7; No. xiii, Article 7.

aiding the combatant. As the Dutch Government had under the Rhine Acts curtailed their powers of intervention in this respect, it would therefore be justifiable for British cruisers to intercept conditional contraband cargoes bound for Rotterdam but very probably intended for Germany, and to detain them until a satisfactory guarantee were given by the Dutch Government that re-exportation from Holland would be forbidden.

Such imposition of a strict embargo on re-exportation would do much to avoid difficulties and friction in the relationships between belligerents and neutrals. Innocent traders and shipowners suffer in all wars; and in a war of great magnitude, their commerce might well-nigh be crippled. But this policy of placing an embargo on goods that might find their way to the enemy Government or forces, together with a careful supervision of the manifest, would almost entirely obviate the search and detention of vessels. Failing this, the inconveniences involved in search and detention should be reduced by the captor to the smallest possible limits.

In any case, notwithstanding declarations of the innocent character and destination of cargoes, Great Britain could not undertake to abandon the right of search and seizure, if suspicious circumstances appeared. Could she be always sure that the declarations were genuine and accurate? As Sir W. Scott (afterwards Lord Stowell) said in a well-known case,<sup>1</sup> the right of visiting and searching merchantmen on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent. It is impossible, otherwise, to ascertain whether there is a just cause for capture. Though the right should be exercised with as little harshness and vexation as possible, it undoubtedly rests at bottom on lawful force. The eminent judge emphasized, in reference to merchantmen under convoy, that even such forcible interposition on the part of a neutral sovereign 'could not legally deprive the belli-

<sup>1</sup> *The Maria*, 1 C. Rob. 840.

gerent of his right. Two sovereigns might well agree that the presence of an armed vessel with their merchant ships should be mutually regarded as implying that the vessels under convoy contained nothing incompatible with amity or neutrality. But no sovereign could compel the acceptance of such security by force. The only security that a belligerent possesses according to the law of nations—apart from special agreement—is the right of visit and search. And this right is as clear in principle, as it is uniform and universal in practice.

On the subject of convoy, the provisions laid down in the two articles of the Declaration of London ought to be mentioned. Article 61 says: Neutral vessels under national convoy are exempt from search. The commander of a convoy must give in writing, at the request of the commander of a belligerent warship, all information respecting the character of the vessels and their cargoes, which could be obtained by search. Article 62: If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he shall communicate his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is to be handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels. The official report on the Declaration adds that should any difference arise between the commander of the belligerent warship and the commander of the convoy—for example, with regard to conditional contraband and the character of the destination—the former may make a protest and leave the difficulty to be settled by diplomatic methods. But if there is no doubt whatever that a convoyed vessel is carrying contraband, then she cannot be regarded as enjoying immunity, and is liable to be seized, forcibly if necessary, by the belligerent cruiser. During the earlier part of the present war there were reports



in the press that the sovereigns of certain neutral countries had met in conference to consider, among other things, the advisability of resorting to the convoy of their respective merchantmen, in order that belligerent cruisers might be debarred from exercising the right of visit and search. But in view of the provisions above stated, the neutral Governments in question would have to adopt measures of strict and genuine supervision with regard to the traffic of their merchantmen, and fully assure themselves of its innocent character.

(b) By way of conciliating neutrals and mitigating their hardships, which result from maritime capture, the British Government have adopted the practice of pre-emption, or forcible purchase, as a substitute for absolute confiscation, and have also recently introduced an innovation in regard to condemned prizes.

Under the Declaration of London articles and material serving exclusively for the care of the sick and wounded are not to be treated as contraband of war. But if they are destined to the armed forces of the enemy, or to the territory belonging to or occupied by the enemy, they may be requisitioned, in case of urgent military necessity, subject to the payment of compensation.<sup>1</sup> Again, if a vessel is encountered at sea making a voyage in ignorance of the existence of hostilities or of the declaration of contraband affecting her cargo, the vessel herself and the non-contraband portion of her cargo, are exempt from condemnation, but the contraband goods may be condemned on condition that compensation is paid for them.<sup>2</sup> Apart from these two cases no provision is made by customary or conventional international law for pre-emption.

But according to the British system, the carriage of conditional contraband and of such absolute contraband goods as were in a raw state and were the produce of the country exporting them was usually followed only by the pre-emption of such goods by the British Government, which

<sup>1</sup> Article 29.

<sup>2</sup> Article 48.

then also paid freight to the intercepted vessel carrying the goods.<sup>1</sup> As to the amount of payment, the Prize Courts were accustomed to award the original price actually paid by the exporter in addition to his expenses and a reasonable profit usually calculated at ten per cent. This earlier practice has not been discontinued<sup>2</sup>; and in the present war its equitable application will no doubt do much to bring relief to innocent neutral claimants.

Again, in conformity with the long-established Anglo-American doctrine the enemy character of vessels is determined, for purposes of maritime capture, by the domicile of the owner—the domicile here contemplated being that frequently designated commercial (as distinguished from personal) domicile. Therefore, if a vessel, though flying the neutral flag, is found to be the property, wholly or partially, of a person domiciled or carrying on trade in the enemy country, his interest in her is liable to confiscation. Under the Declaration of London, the test of the flag (as we have already pointed out) is affirmed, subject to the rules as to transfer. In any case, as soon as the enemy character of a vessel is established, outstanding interest in her or her cargo, such as mortgages and liens, that are claimed by neutrals are disregarded by the Courts both in principle and on grounds of convenience. For, having regard to the risk of fraudulent transactions, that are often scarcely discoverable, and to the impossibility of sifting such claims, Prize Courts have at all times been compelled to adopt this uncompromising rule. And so in the case of *The Marie Glaeser*,<sup>3</sup> which was heard during the present war (September 16), the Judge of the Prize Court held that no account could be taken of mortgages, charges, or liens on enemy property. But by way of relaxing the strictness of this rule and alleviating the hardships suffered by neutral claimants, the Government appointed a committee to inquire into the equities in each case, and, where it seems fair, to

<sup>1</sup> Cf. *The Haabet*, 2 C. Rob. 179; *The Sarah Christina*, 1 C. Rob. 287.

<sup>2</sup> Cf. the Naval Prize Act, 1864, s. 88.

<sup>3</sup> See the following chapter.

appropriate to the innocent mortgagee or lien-holder a portion of the proceeds derived from the sale of a prize.

(c) In order to illustrate several of the questions presented above, relating to contraband, search and seizure, we may, in concluding this chapter, consider the American Notes of protest to the British Government. Coming from the most powerful neutral State to the most powerful maritime belligerent, they aroused at the time universal interest.

In the first Note, delivered early in November, the United States Government protested against certain features of the contraband policy adopted by Great Britain. Above all, it was urged that Great Britain went beyond her legitimate rights in seizing and detaining neutral ships bound for neutral ports, on the mere ground that they were suspected of carrying contraband destined ultimately for the enemy. Ships, it was argued, could be seized only when actual evidence of guilt was found on board after visit and search; a belligerent had no right to take them into port for investigation; all that could legally be done was to search them on the high seas, and release them if no evidence of culpability was found. If there was a suspicion that smuggling went on in regard to certain commodities, it was an affair entirely between Great Britain and the neutral countries suspected of re-exportation. For the American shipper could not properly be held responsible for the ultimate disposal of his goods, after they had come into the possession of the neutral consignee.

The second Note of remonstrance was communicated by the American Ambassador to the Foreign Office, December 28. It was couched in much stronger terms, though it was declared to have been conceived in an entirely friendly spirit. It protested once more against the detention of vessels, it made several fresh complaints, and solemnly warned the British Government that what was regarded as an unwarrantable interference with the legitimate American commerce had aroused much feeling in the United States. There was a belief in the country that the existing depres-

sion in many American industries was due to the British policy. The practice of pre-emption following the seizure of cargoes did not entirely remedy the evil, for the main concern was the general demoralizing effect on the American export trade. The State Department, therefore, felt justified in asking for information as to the manner in which the British Government intended to carry out their policy, in order that it might determine the steps necessary to protect American citizens in their rights and save them from serious loss. The Note pointed out the general restrictions imposed on belligerent interception of neutral shipping. "Peace, not war," it said, "is the normal relation between nations: commerce between countries which are not belligerents should not be interfered with by those at war unless such interference is manifestly an imperative necessity to protect their national safety, and then only to the extent that it is a necessity. It is with no lack of appreciation of the momentous nature of the present struggle in which Great Britain is engaged, and with no selfish desires to gain undue commercial advantages, that this Government is reluctantly forced to the conclusion that the present policy of his Majesty's Government towards neutral ships and cargoes exceeds the manifest necessity of a belligerent, and constitutes restrictions upon the rights of American citizens on the high seas which are not justified by the rules of international law, or required under the principle of self-preservation." As to the list of contraband, the United States Government did not complain so much of the modifications and additions that had been made, although some of the articles included in it were open to objection. What they did complain of was the treatment of conditional contraband in the same manner as absolute contraband: that is, the interference with American foodstuffs shipped to neutral countries when there was no positive proof that the consignments were meant for the German forces. Lord Salisbury's pronouncement was quoted, to the effect that foodstuffs though having a hostile destination could not be considered contraband unless they were intended for the

enemy forces, that it was not sufficient that they could be so used, but it must be shown that at the time of seizure this was in fact their destination. In every case, the Note argued, the proof of the hostile destination of a cargo must be evident at the time of search at sea, and ships should not be diverted to belligerent ports merely on 'suspicion. The treatment of copper was likewise resented. It was alleged that Great Britain did not treat shipments to Italian ports in the same way as she treated those to Scandinavian ports. Even though the Italian Government had proclaimed an embargo on the exportation of copper, consignments of copper to Italy were detained, whilst those to Scandinavia were not intercepted. Finally, the United States Government contended that consignments shipped to order instead of to a specific consignee ought not to be treated as suspect; and that in every case the onus of proof lay on the belligerent.

On January 7 Sir Edward Grey communicated to the American Ambassador a Note in which an interim reply was given to the American protest. These preliminary observations were intended to clear the ground and remove certain misconceptions—and we may say at once that they effectively disposed of the contentions of the United States, and clearly vindicated the action of the British Government. His Majesty's Government, it was stated, concurred in the principle that a belligerent in dealing with neutral trade should not interfere, unless interference was necessary to protect the belligerent's national safety, and then only to the extent of such necessity. But interference with contraband goods destined for the enemy's country must continue; and where the principle was unintentionally exceeded, redress would be made. The Note met the charge that Great Britain was responsible for a heavy decrease in American trade with neutral countries contiguous to the seat of war; it pointed out that, on the contrary, the figures available showed an enormous increase in American exports, and that the shrinkage of certain industries was due rather to the diminished purchasing power of such countries as France, Germany, and the United Kingdom than to interference

with American trade with neutrals. In the case of copper, United States exported to Italy, during the war period, to the end of the third week in December, over 21,000,000 lb. more than in the corresponding period of 1913; there was a still greater increase in the exports to Norway, Sweden, Denmark, and Switzerland. The presumption was, therefore, that such copper was not intended for neutral use alone, but for the use of a belligerent who was not able to import it directly. According to positive evidence, four detained consignments to Sweden were clearly destined for Germany. In the face of these facts and figures the United States would hardly question the propriety of the British Government's action in taking suspected cargoes to a Prize Court, and would hardly wish to strain international law against this country. The British Government admitted that food-stuffs should not be detained and brought before a Prize Court without presumption that they were intended for the armed forces of the enemy or the enemy Government; and this rule was till then and would be henceforth adhered to in practice. But the British Government could not give an unlimited and unconditional undertaking, in view of the departure by the enemy from accepted rules of civilization and humanity, and the uncertainty to what extent such rules might be violated by him in future. Modern conditions demanded that vessels should be brought into port for examination; for the right of search could not well be exercised on the open sea. It was only by careful search of this kind that rubber was discovered to have been shipped from the United States under another designation, in order to escape notice. Further, from information received, ships carrying cotton—an article on the free list—would be specially selected to carry concealed contraband, for example copper. With regard to rubber, a provisional arrangement was made by his Majesty's Government with the rubber exporters in Great Britain, whereby licences would be given under proper guarantees to permit the export of rubber to the United States. The delayed publication of manifests on the part of the United States increased the

difficulty of ascertaining the presence of contraband. In conclusion, the Note emphasized that his Majesty's Government did not desire to contest the general principles of international law on which the United States Note appeared to be based; they desired to restrict their action solely to interference with contraband destined for the enemy; and they were ready to explain any case of detention and to enter into any arrangement to prevent mistakes and facilitate reparation.

The above interim reply was followed later by Sir Edward Grey's more elaborate Note (published February 18), which dealt more exhaustively with the same points; so that there is no need to give it here. We must refer, however, to its concluding paragraph, which foreshadowed a more drastic policy on the part of Great Britain in consequence of the German methods of conducting the war. "It will still be our endeavour," it was declared, "to avoid injury and loss to neutrals; but the announcement of the German Government of their intention to sink merchant vessels and their cargoes without verification of their nationality or character, and without making any provision for the safety of non-combatant crews or giving them a chance of saving their lives, has made it necessary for his Majesty's Government to consider what measures they should adopt to protect their interests. It is impossible for one belligerent to depart from rules and precedents and for the other to remain bound by them."

In reference to the British contraband policy, we may add here that Mr. Bryan, the American Secretary of State, in a communication (published by the State Department, January 24) to the chairman of the Senate Committee on Foreign Relations, pointed out that the record of the United States in the past was not free from criticism. "When neutral," he observed, "this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent we have contended for a liberal list, according to our conception of the necessities of the case. . . . The rule of 'continuous voyage' has been not only asserted by

American tribunals, but extended by them. They have exercised the right to determine from circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order,' from which, as a matter of fact, cargoes have been shipped to an enemy, is corroborative evidence that the cargo was really destined to an enemy instead of to a neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to, or outgrowths from, policies adopted by the United States of America when it was belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore." With regard to placing unwrought copper on the list of absolute contraband, he added that as the United States in the past had placed "all articles from which ammunition was manufactured" in its contraband list, and had declared copper to be among such materials, the Government necessarily found "some embarrassment in dealing with the subject."

(d) In February, 1915, a question of vital importance arose respecting the position of foodstuffs. It was announced that the German Government, conformably to a decree made by the Federal Council on January 25, were to take over on February 1 the grain and flour imported into the country. Now foodstuffs, being conditional contraband, are liable to seizure if there is evidence to show that they are destined for the use of the armed forces or of a Government department of the enemy State. Therefore, if the Declaration of London on this point is to be regarded as binding, it would follow that all corn and flour shipped to Germany after February 1 are liable to seizure and condemnation. Failing the Declaration of London, the old-established principles of international law apply. We find that already in 1793 the United States held that provisions might well be declared contraband, if there were



a reasonable expectation of reducing an enemy by famine. During the Russo-Japanese War, when Russia declared foodstuffs to be absolute contraband, the United States Government protested, and emphasized that the proper tests of the contraband character of goods were warlike nature, use, and destination. Accordingly Russia made new regulations, but still regarded food as contraband if consigned to the enemy Government.

In the present case, there can be little doubt that the reason for the action of the German Government in taking over such supplies was not merely their desire to look after the civilian population. Their main desire must have been to husband all their possible resources in consideration of their enormous army's need. Now the fundamental criterion of contraband character is this—are the commodities in question indispensable to the prosecution of the war? Food is just as essential for the forces as bullets are for their guns, and therefore is equally seizable if encountered in transit to them. And if it is consigned to or placed under the exclusive control of the Government, the natural presumption is that it is destined for the Government's soldiers—whether exclusively or not is immaterial. If what is intercepted would have gone to feed the non-combatants too, then the responsibility for the seizure and for the deprivation suffered by the civilian population lies with their own Government for taking such commodities over; for it is impossible for the adversary to draw a clear line of demarcation between that which is intended for the belligerent forces and that which may be set apart for the civil population. Thus we cannot evade the conclusion that foodstuffs, in these circumstances, are, apart from considerations of public policy, lawfully subject to capture and condemnation.

Accordingly, his Majesty's Government gave directions that the *Wilhelmina*, bound for Hamburg with foodstuffs from the United States, should be intercepted and her cargo seized as contraband. At the same time assurances were given that the owners of the vessel, and the owners of the

cargo, if it should be condemned as contraband by the Prize Court, would be equitably indemnified.

However, Germany realizing that such action on the part of Great Britain was a natural corollary to her own decree, and was in accordance with the principles of international law, issued a subsequent decree, February 6, which repealed the former provision requiring that grain and flour should be delivered only to certain organizations under direct Government control or to municipal authorities. Had other circumstances been normal, this repeal would have restored foodstuffs consigned to Germany to the class of conditional contraband. But other circumstances were not normal; Germany persisted in her policy of disregarding law and well established usage. The German cruiser Karlsruhe sank (September 1914) the Dutch vessel Maria, which sailed from California with a cargo of grain consigned to Dublin and Belfast—and this without ascertaining whether the grain was destined for the British Government or armed forces. Therefore his Majesty's Government felt that they would be justified in adopting measures of reprisal, if necessary, by declaring foodstuffs to be absolute contraband.

## CHAPTER XIX

### MARITIME CAPTURE—BELLIGERENT SHIPS UNDER NEUTRAL COLOURS—DESTRUCTION OF PRIZES—PRIZE COURTS—ENEMY COMBATANTS ON NEUTRAL VESSELS

(a) WE have already referred to the seizure of belligerent ships found in the enemy's ports or encountered on the high seas at the outbreak of the war, and we have given some cases tried in the Prize Court; for example, *The Chile*, *The Möwe*, *The Perkeo*.<sup>1</sup> Here we have to deal with certain kindred questions, which will supplement those considered in the four preceding chapters.

In the case of war on land, international law lays down provisions, as we have seen,<sup>2</sup> to secure the immunity of enemy private property from capture and confiscation. In maritime war, however, private property of the enemy—whether it be vessels or goods unprotected by the neutral flag—is liable to capture. Till about the middle of the nineteenth century the practice assumed still wider proportions, though there was no uniform system or procedure. Some States held enemy cargoes found on neutral vessels to be liable to seizure, because of the intrinsic hostile character of the goods; other States exercised the right to capture, unless waived by treaty, neutral goods found on enemy vessels on the ground that the hostile character of ships tainted their cargoes. Great Britain and France, representing these two groups of Powers, agreed during the Crimean War (as has already been mentioned) upon uniform action, each undertaking

<sup>1</sup> See *supra*, Chap. IV (c).

<sup>2</sup> *Supra*, Chap. XIII.

to forgo certain rights. After the conclusion of the war the leading European Powers signed the Declaration of Paris, 1856, which pronounced against privateering, and asserted that enemy's goods, excepting contraband of war, are protected by the neutral flag, and neutral goods, with the exception of contraband, are not liable to capture when under the enemy's flag.

Whether private property at sea should be exempt from capture altogether has for some time been a subject of controversy. There have long been conflicts in practice as well as in opinion. States have differed from each other in their action, as much as publicists and international jurists have differed in their contentions. Moreover, general opinion has from time to time fluctuated; the motives of self-interest have naturally played a great part in provoking arguments for or against the capture of private property. The United States has frequently advocated the principle of immunity. In 1823 she invited, though unsuccessfully, Great Britain, France, and Russia to accept it; and again in 1856 she was prepared to sign the Declaration of Paris on condition that this principle was accepted by the European Powers. At various times during the nineteenth century treaties were entered into between States to secure reciprocity of treatment; but this movement to establish general exemption was confined to Powers that were from a naval point of view comparatively weak. Towards the end of the nineteenth century, whilst the advocacy of the principle by no means ceased, there was in certain quarters a change of opinion. Thus in 1892 Count Caprivi, the German Chancellor, observed that the different methods that had been introduced in conducting maritime war did not tend to favour the immunity of private property at sea, and that in future warfare the destruction of the enemy's commerce, rather than naval victories, would be the determining factor in deciding the fortunes of a war. At the Hague Conferences of 1899 and 1907 proposals were brought forward to exempt private property at sea from capture, except in the carriage of

contraband or an attempted breach of blockade, but no agreement was arrived at. It is to be noted that Great Britain's opposition to the proposal was supported by ten other States, including France, Russia, and Japan.

In some quarters it was urged during this war—as though a maritime belligerent's right of capture was not already wide enough—that Great Britain should repudiate the Declaration of Paris, and seize the enemy's merchandise wherever found. The reason given was that the advantages which ought to accrue to a preponderating fleet cannot be fully obtained, if the enemy is allowed to convey his merchandise in neutral vessels. Moreover, it was urged that such repudiation would be a legitimate reprisal for the disregard of the first article of the Declaration on the part of Germany, which was alleged to have indulged in a species of privateering, in the form of a pretended conversion of merchantmen into warships on the high seas; and, on that account, the denunciation would be also legally justifiable as the signatory Powers had pronounced the entire Declaration to be one and indivisible. Further, the argument was advanced that the Declaration of Paris was signed by Lord Clarendon and Lord Cowley without due authority, that it was never ratified by a British sovereign, that it is neither a treaty nor a convention, that it does not possess the authority of either, that it was not accepted by the United States and other Powers, and therefore it does not constitute part of the law of nations.

In reply to these contentions it may be said, firstly, that whatever violations of international law Germany has committed in this war, there has been so far no reported case of privateering in the proper sense of the term, at all events in the sense contemplated by the Declaration of Paris. The conversion of merchantmen into warships on the high seas is not privateering. Properly commissioned merchantmen that are placed under the direct authority, immediate control, and responsibility of the Power whose flag they fly are not

privateers.<sup>1</sup> As to the place of conversion no agreement was reached either in 1907 at The Hague or in 1909 at the London Naval Conference. The plenipotentiaries of Great Britain, United States, and Japan held that merchantmen should be converted only in their national ports or in ports under military occupation, whilst the delegates of France, Russia, and Germany maintained that they could also be converted on the high seas. Secondly, the Declaration of Paris has for over half a century received general acceptance; nearly all the States that were not original parties thereto have formally acceded to it, and others, like the United States, that have not solemnly signified their adhesion to it have none the less considered themselves bound by it. Thus, whilst the United States Government refused to subscribe to it in 1856 (because they wished the capture of non-contraband private enemy property to be abolished along with privateering), they acted in accordance with it during the Spanish-American War, 1898, when they described the principles therein laid down as recognized rules of international law. On this occasion, too, Spain, which had not originally subscribed to it, gave orders that its rules should be observed.<sup>2</sup> Great Britain has steadfastly adhered to it. In a recent case of maritime capture,<sup>3</sup> when a question was raised as to its application, the President declared that the Prize Court would regard the Declaration as possessing binding force in the conduct of war, and as a recognized and acknowledged part of the law of nations. Thirdly, the distinction drawn between a Convention and a Declaration is untenable. The multiplication of formalities does not necessarily impart to an engagement a more sacred character and greater operative force. The Declaration of Paris is now as firmly established a portion of international law as any law-making treaty or international convention, and it is regarded as possessing universal applicability. ◀

<sup>1</sup> Cf. the Seventh Convention of The Hague (1907), Article 1.

<sup>2</sup> Cf. Hertslet, *Commercial Treaties*, vol. xxi. p. 887.

<sup>3</sup> *The Marie Glaeser*; see further on in the present chapter.

We have pointed out in the earlier part of the preceding chapter that Germany charged Great Britain with the commission of various violations of international law in regard to the treatment of contraband. Here we have to mention that in a Memorandum, dated February 4, the British were accused also of violating the Declaration of Paris, in that their naval forces seized in neutral ships private German property that was not contraband. From the above considerations it is clear that if acts of this kind alleged really took place they certainly amount to a breach of well-established rules of international law.

Further, Great Britain was accused of violating international law, inasmuch as her merchantmen on one or two occasions hoisted neutral colours in order to avoid capture by German cruisers. For example, the *Lusitania* had thus assumed the American flag, and eluded German warships. In ordinary circumstances a merchantman is, of course, not entitled to fly a neutral flag. But maritime custom allows the practice for the purpose of effecting an escape from the enemy. On February 7 the Foreign Office issued the following statement : "The use of the neutral flag is, with certain limitations, well established in practice as a '*ruse de guerre*.' The only effect in the case of a merchantman of wearing a flag other than her national flag is to compel the enemy to follow the ordinary obligations of naval warfare, and to satisfy himself as to the nationality of the vessel and of the character of her cargo by examination before capturing her and taking her into a Prize Court for adjudication. The British Government has considered the use of British colours by a foreign vessel legitimate for the purposes of escaping capture. It is recognized in the Merchant Shipping Act, 1894, sec. 69 (1), and in the instructions to British Consuls, 1914. No breach of international law is thereby committed." Moreover, it was reported in the United States that the *Bohemia*, a vessel belonging to the Hamburg-America line, entered New York on August 15 flying the British colours, as well as White Star Line colours, in order to deceive the British warships.

On another occasion a German steamer is said to have hoisted the Spanish flag when she was approaching Teneriffe. In earlier days the practice was extremely common; and it has always been recognized as legitimate. Nelson, whilst lying off Barcelona, displayed the French flag for some time, in the hope that the ships of Spain, which was then allied with France, might come out of their harbours: and the lawfulness of his proceeding was not questioned. Warships may assume colours, other than their own, in order to deceive the enemy, so long as their true flag is shown before entering into action.

On February 12, the United States Government presented a Note to the British Government in which a distinction was drawn between the occasional use of neutral colours and a general authorization to make use of them. "The occasional use of the flag of a neutral or an enemy under the stress of immediate pursuit, and to deceive an approaching enemy, which appears by Press reports to be the precedent for the justification used to support this action, seems to this Government a very different thing from the explicit sanction by a belligerent Government for its merchant ships generally to fly the flag of a neutral Power within certain portions of the high seas which, it is presumed, will be frequented with hostile warships. A formal declaration of such a policy for the general misuse of a neutral's flag jeopardizes the vessels of a neutral visiting those waters in a peculiar degree by raising the presumption that they are of belligerent nationality, regardless of the flag which they may carry." Thus, the essential point of the American contention is, not that the use of a neutral flag is intrinsically illegitimate, but that its general use exposes to attack vessels of that flag's nationality.

(b) One or two cases as to maritime capture that were considered by the Prize Court may now be referred to, especially as they furnish recent and interesting illustrations of various points of international law that have been dealt with in the preceding chapters.



The case of *The Marie Glaeser*<sup>1</sup> (September 11, 16) raised the question of British and neutral claims on captured vessels. The *Marie Glaeser*, a German steamship, bound from Bristol to Archangel, in ballast, left Bristol on August 1, and put into Barry on August 4. She left the same day, and was captured at sea on August 5, and was sent into Greenock for adjudication. Her condemnation—and not merely detention—was asked for, on the ground that Germany had refused her adherence to Article 2 of the fourth Convention of the Hague Conference (1907). Notices of appearance were entered by three classes of persons—shareholders, mortgagees, and persons claiming for brokerage and necessities.

In the course of his judgment the President pointed out that according to the old practice the flag was deemed to determine the fate of the whole ship in case of capture, and no heed was paid to the joint ownership of the friend or the neutral. Whoever held shares in a ship was bound by the character of that ship whatever it might happen to be.<sup>2</sup> It would be contrary to public policy to encourage British subjects to invest in the shares of foreign merchantmen, by conferring immunity on their property in case these merchantmen became enemy vessels. Further, maritime liens as giving a legal charge on captured property were not recognized by the Prize Court.<sup>3</sup> But to British merchants who had before the war supplied necessities to the captured vessels, the Crown of its bounty might make grants out of the proceeds of the sale of prizes. Accordingly, in the present case the President left it to the Procurator-General to inquire into the merits of any such claim, and to give effect to it should an equitable right be established.

As to claims under mortgages on a captured vessel which are held by neutral or friendly subjects, the President pronounced against them. A mortgage has no greater validity

<sup>1</sup> 31 T. L. R. 8.

<sup>2</sup> *The Primus* (1854), Spinks 48.

<sup>3</sup> *The Tobago* (1804), 5 C. Rob. 218; *The Marianna* (1805), 6 C. Rob. 24.

as against captors than a bottomry bond or other maritime lien; indeed, there is authority for the postponement of a mortgagee of a ship to the holder of a bottomry bond. Maritime capture would be a hazardous and worthless proceeding, if the title of the captors was liable to be ousted by the claims of various incumbrancers. In some earlier cases<sup>1</sup> mortgages on captured vessels were declared to be invalid. In answer to the contention that the Declaration of Paris, 1856, which exempted from capture neutral goods on enemy vessels, should be extended to cover neutral property in enemy vessels, it was pointed out that the Declaration was not intended to alter the law as to the capture of ships, and the position of ships was altogether different from that of goods carried on the ships. In several American cases decided since the Declaration of Paris, it has been held that neutral mortgages upon enemy vessels were to be treated in prize proceedings only as liens, subject to being overridden by the claims of the captors.<sup>2</sup> To the same effect decisions were pronounced in the French<sup>3</sup> and the Japanese Prize Courts. During the Russo-Japanese War, the Japanese Prize Court declared that the right of the captor is absolute;<sup>4</sup> if the ship is a lawful prize, she cannot be released on account of a neutral person having a claim against her.<sup>5</sup> Whatever property a mortgage may give to the holder, neutral and friendly property in an enemy vessel, that is, a vessel flying the enemy flag, was involved in the capture. Both the captor and the Court have regard only to the outward character of the vessel, and must disregard rights depending on private agreement. Therefore, according to principle as well as practice the claims of mortgagees of enemy ships cannot prevail as against the rights of the captors.

<sup>1</sup> *The Aina* (1854), Spinks 8.

<sup>2</sup> *The Hampton* (1866), 5 Wall. 872; *The Battle*, 6 Wall. 498; *The Carlos F. Roses* (1899), 177 U. S. Rep. 655.

<sup>3</sup> For example, a decision in 1870; cf. Barboux, *Jurisprudence du Conseil des Prises*, 1870-1, p. 76.

<sup>4</sup> *The Nigretia* (1905), Takahashi, p. 552.

<sup>5</sup> *The Russia* (1904), *ibid.*, p. 557.

In *The Tommi* and *The Rothersand*<sup>1</sup> (October 15) the questions of the enemy character of merchantmen, the transfer to a friendly flag, and the character of companies were involved. These two vessels had been the property of a German company engaged in the trade of carrying molasses. On August 1 whilst they were on the high seas, on a voyage between Hamburg and London, they were alleged to have been sold, under a contract made by telegram, to an English company carrying on the same business. Flying the German flag they arrived at Gravesend, August 5, and were there seized as prizes. As in the case of *The Chile*,<sup>2</sup> a suit was brought for their detention on the ground that they were enemy vessels that had been seized in a British port at the outbreak of the war. But the English company claimed that the vessels were their property and therefore exempt from seizure.

The Court, however, pronounced the claim to be invalid for three reasons. In the first place, the ships were lying in port under the enemy flag, which determined their hostile character; for both by the long-established British Prize law and by the London Declaration,<sup>3</sup> the flag is conclusive against a vessel though not necessarily in its favour. Secondly, even if they had been flying the British flag they would not have been immune from capture, seeing that their transfer was not made *bona fide*; the transaction must be presumed to have been made for the purpose of evading seizure. A transfer from an enemy to a neutral or to the national flag is, under our old Prize law<sup>4</sup> as well as by the Declaration of London,<sup>5</sup> void as against captors, if the change was made in anticipation of war with this country. Thirdly, it was held that the English company to which the alleged sale was made could not for the purposes of Prize law be regarded as a genuine English purchaser. Though it was incorporated in this country, nearly the

<sup>1</sup> 81 T. L. R. 15.

<sup>2</sup> See *supra*, Chap. IV.

<sup>3</sup> Article 57. See also *supra*, Chap. XVII (c).

<sup>4</sup> *The Jan Frederick*, 5 C. Rob. 128. See also *supra*, Chap. XVII (c).

<sup>5</sup> Article 55.

whole of its capital was owned by German subjects, and some of its directors were German. Moreover, it was engaged in the same trade as the German vendor company, and was in fact hardly more than a branch or agency of the German company. Under municipal law a one-man company, of which seven nominal shares are held by English dummies and the whole capital otherwise belongs to an alien, may acquire British vessels and hoist the British flag on them. But Prize law disregards legal fictions, and pays heed to the essential character of such corporations. Accordingly, if a Prize Court finds that they are substantially enemy concerns, it will refuse to consider them entitled to the immunity accorded to friends.

In *The Miramichi*<sup>1</sup> (November 2, 23) the Prize Court considered the question whether goods shipped, under a contract between a neutral vendor and an enemy buyer, on a British vessel before the outbreak of war, though not in anticipation of it, were subject to condemnation if seized on their way to the enemy, when the documents are not taken up by the enemy buyers, and money has been advanced on them by neutral persons. In June 1914 an American firm agreed to sell a cargo of wheat to a German firm carrying on business in Germany. The wheat was shipped at Galveston on July 23 on a British ship bound for Amsterdam. On September 1 the cargo was seized by the customs officer at Manchester. On September 3 the buyers refused to accept the documents. Both the Crown and the sellers claimed the cargo.

The President delivered an elaborate reserved judgment. Enemy goods in a British vessel are liable to seizure in port in time of war. But where goods are contracted to be sold and are shipped in time of peace without any anticipation of imminent war, and are seized in transit to the enemy after hostilities have begun, they are not subject to condemnation, unless under the contract the property in the goods has by that time passed to the enemy. The determining criterion of ownership is not the incidence

<sup>1</sup> 81 T. L. R. 72.

of risk but the intention of the parties. The Court held, therefore, that as the property in the goods at the time of seizure still remained in the neutral seller the goods were to be released.

The case of *The Berlin*<sup>1</sup> came before the Prize Court, October 28. The vessel in question was a German sailing cutter that had been seized by H.M.S. *Princess Royal* in the North Sea (August 5) at a distance of some five hundred miles from Emden, her home port, and at a distance of about eighty miles from the Scottish coast. She had on board a cargo of fish and materials for curing. In the suit for her condemnation it was urged that she was not entitled to exemption from capture conferred by the eleventh Convention of the Hague Conference, 1907, on coastal fishing-vessels, because of her size and the distance from the coast at which she was taken.

The President, in the course of his judgment, observed that the practice respecting the immunity of fishing-vessels from capture was considered in 1899 in the American case of *The Paquete Habana* and *The Lola*.<sup>2</sup> They were two fishing-boats sailing under the Spanish flag, and were captured off the coast of Cuba by the United States cruisers after the outbreak of the Spanish-American War. The judgment of the majority of the Supreme Court was to this effect: ". . . At the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, . . . it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption . . . does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create

<sup>1</sup> 81 T. L. R. 38.

<sup>2</sup> 175 U. S. Rep. 677.

a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which Prize Courts administering the law of nations are bound to take judicial notice of, and give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter." The Japanese Prize Court adopted similar principles. In Great Britain there appears to be no decided case that considers such immunity to be derived from the law of nations.<sup>\*</sup> But after the lapse of a century it has become a well settled doctrine, apart from Conventions, that fishing-vessels following their industry near the coast—not necessarily in territorial waters—are not subject to capture, so long as they confine themselves to the peaceable work which the industry properly involves. But the *Berlin* did not fall within this category. By reason of her size, equipment, and voyage, she was a deep-sea fishing vessel, engaged in a commercial enterprise, which formed part of the trade of the enemy country, and was properly captured as a prize of war. Accordingly, both the ship and the cargo were condemned.

(c) In the cases we have considered above proceedings were taken against the vessels themselves, which were in port or had been brought there and delivered into the custody of the Prize Court. It may happen, however, that the ship's papers, and not the ships themselves, are sent in for adjudication. This comes about when the prizes are destroyed at sea. In the course of the present war numerous prizes taken by the belligerents have been deliberately sunk, and not taken into port at all. In what circumstances, then, is the destruction of prizes at sea legitimate?

<sup>\*</sup> Cf. *The Young Jacob and Johanna*, 1 C. Rob. 20; *The Liesbet van der Toll*, 5 C. Rob. 288.

If the prize taken is an enemy vessel and cargo, the captor is entitled, according to a generally accepted rule of international law, to destroy her, provided she is in such a condition as to render navigation dangerous, or that it is unsafe to take her into port on account of the proximity of the enemy, or owing to other circumstances that might seriously jeopardise the captor. However, where insuperable necessity dictates destruction, the crew and the ship's papers must first be removed. In 1812, on the outbreak of the war between Great Britain and the United States, the American Government ordered their naval officers to destroy all British merchantmen they captured, unless they were "very valuable and near a friendly port."<sup>1</sup> Shortly afterwards an American vessel, the *Felicity*, was captured by a British cruiser. The vessel was then in a leaky condition, and it seemed doubtful whether she could be brought to a British port without assistance. Besides, the cruiser having been detached on special service with a view to engaging a more powerful enemy warship, was not in a position to diminish her strength by sending a prize crew on the *Felicity*. Therefore it became necessary to destroy her; and the crew were then removed and the vessel and cargo set on fire. In 1819, in a suit for damages claimed on various grounds, Sir W. Scott (Lord Stowell) observed in the course of his judgment<sup>2</sup> that as a rule a captor was bound to bring in his prize for adjudication, so that the true character of the vessel might be ascertained and injuries to neutrals avoided. But in the case in question both vessel and cargo were clearly enemy property; consequently the enemy incurred no greater loss through the failure to bring her in for condemnation. Moreover, the captors justified their action on the ground that the immediate service in which they were engaged did not permit them to spare any of their crew. In this conflict of duties the only course that could be adopted was to destroy the vessel; for they could not, consistently with their duty

<sup>1</sup> Cf. *British Parliamentary Papers, America*, No. 2 (1873), p. 98.

<sup>2</sup> *The Felicity* (1819), 2 Dodson, Adm. Rep. 381.

to their own country, allow an enemy ship to sail away unmolested. On the other hand, where it was doubtful whether the property was enemy property and it was impossible to bring it in, the proper course was to release the vessel; but if it was destroyed and it turned out to be a neutral vessel, then full restitution in value should be made to the neutral owner.<sup>1</sup> These rules were as clear in principle as they were well established in practice. It should be added that, according to British usage, even if the ship destroyed is an enemy ship, innocent neutral cargo on board is paid for.<sup>2</sup>

The modern practice of the United States is shown in the following Instructions issued by her Navy Department: "The title to property seized as prize changes only by the decision rendered by the Prize Court. But if the vessel itself or its cargo is needed for immediate public use, it may be converted to such use; a careful inventory and appraisal being made by impartial persons, and certified to by the Prize Court. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony shall be sent to the Prize Court in order that a decree may be duly entered."<sup>3</sup>

It is clear, then, that the practice of sinking captured enemy merchantmen, which was described during the present war in some quarters as illegitimate, is lawful, if it is exercised in some such circumstances as we have indicated. One or two examples of foreign practice may be given. In the American Civil War the Confederates destroyed their prizes on the ground that they could not be taken in for adjudication owing to the blockade of their

<sup>1</sup> Cf. *The Action*, 2 Dodson, 48; *The Leucade*, Spinks, 281.

<sup>2</sup> Cf. *Parliamentary Papers* (1909), *Miscellaneous*, No. 4, p. 9.

<sup>3</sup> Cf. Moore, *Digest of International Law*, vol. vii. p. 518.



ports by the Northerners. In the Franco-German War the French burned two German vessels (1870), although they had neutral goods on board; indeed it was then held by the Conseil d'État, that the neutral owners of the cargoes destroyed were not entitled to any indemnity.<sup>1</sup> In the Russo-Turkish War, 1877, the Russians destroyed some of their prizes in the Black Sea, as their ports were blockaded by the Turkish warships. Similarly, in the Russo-Japanese War, 1904-5, several Japanese merchantmen were sunk, no attempt having been made to take them in for condemnation. Though the destruction of several British merchantmen by German cruisers, especially by the Emden—which regularly provided for the safety of those on board—was in accordance with established usage, we must record that the deliberate sinking of British fishing-boats in the North Sea was an infringement of a well established rule of law—recognized even as far back as the Middle Ages—which renders such vessels inviolable.<sup>2</sup>

On February 4, 1915, Germany, in her extraordinary declaration of "blockade," to which we have referred elsewhere,<sup>3</sup> threatened to sink merchantmen without any notification, and without making provision for the rescue of the crews and other persons on board. The execution of the threat was not only a flagrant violation of international law and a gross outrage on humanity and civilization, but it amounted practically, if not literally, to deliberate cold-blooded murder of defenceless persons taking no part in hostilities. Several British merchantmen, and two or three belonging to neutral States, were thus torpedoed by German submarines, and their crews were allowed to perish, or save themselves as best they could. By about the middle of March 1915 more than twenty British merchantmen and passenger boats were unsuccessfully attacked by these submarines, and about fifteen merchant vessels were torpedoed. Retaliatory measures were inevitably called for. Accord-

<sup>1</sup> See Calvo, *Droit international*, vol. v. § 8083.

<sup>2</sup> The Hague Conference (1907), Eleventh Convention, Article 8.

<sup>3</sup> See Chap. XX, *in fi* .

ingly, his Majesty's Government resolved (March 1) to impose drastic restrictions on German commerce, and to stop all ships to and from German ports. We shall refer to this action more fully in the following chapter.

As to the position of neutral merchantmen taken as prizes for engaging in unneutral service or carrying contraband, etc., we have already seen, from the judgment of Lord Stowell, that the British practice generally has been to release them, if it was impossible to take them in for adjudication; but where urgent circumstances demanded their destruction, the owners of both vessel and cargo were fully indemnified. Japan and Holland followed a similar policy.<sup>1</sup> A more rigorous system was adopted by several leading Powers—for example, the United States,<sup>2</sup> France, Russia, Germany—whereby the neutral prize might be destroyed if it could not be brought in without risk to the captor. In the Russo-Japanese War Russian cruisers sank several neutral merchantmen. Among these was a British vessel, the *Knight Commander*, which was sunk because she carried contraband. The legitimacy of the proceeding was upheld by the Russian Courts, and the British claim for compensation was rejected as regards the interests of the owners of the vessel, but admitted in respect of the innocent cargo. The protest of his Majesty's Government, however, induced Russia to promise not to destroy neutral prizes again. In 1907 the Hague Conference discussed the question without arriving at any agreement. But two years later the London Naval Conference in their Declaration laid down a number of rules, which require the captor to take a neutral prize into port,<sup>3</sup> save in cases of exceptional necessity;<sup>4</sup> but before destruction the persons on board and the ship's papers must be removed.<sup>5</sup> If the capture of a neutral vessel, of which the destruction was justified, is subsequently

<sup>1</sup> *Parliamentary Papers, Miscell.* No. 5 (1909), p. 101. Cf. Takahashi *International Law Applied to the Russo-Japanese War*, p. 788.

<sup>2</sup> *Parliamentary Papers, ibid.*, p. 99.

<sup>3</sup> Declaration of London, Article 48.

<sup>4</sup> Article 49.

<sup>5</sup> Article 50.

held to be invalid, the captor must compensate those interested, in place of the restitution to which they would have been entitled.<sup>1</sup> If neutral goods which were not liable to condemnation have been destroyed along with the vessel, the owner of such goods is entitled to compensation.<sup>2</sup>

(d) We have noted the part played by the Prize Court in adjudicating as to the legitimacy of captures. The last Prize Court held in this country before this war was in 1854, during the Crimean War. On that occasion, in the case of *The Leucade*, the presiding judge, Dr. Lushington, observed that a fundamental object of the Prize Court was to preserve undiminished neutral rights without derogating from belligerent rights, which are equally sanctioned by the law of nations, and to reconcile the abstract principles of justice with practicability.

The Prize Court is an institution of long standing. Its sources may be traced back to the later centuries of the Middle Ages. In order to secure protection against pirates merchantmen associated themselves under an elected chief, called the "Admiral," and sometimes their respective States sent out armed vessels to put down piracy. The piratical ships thus seized were divided among the captors according to the decision of the Admiral. In the thirteenth century an attempt was made by the European maritime Powers to police the seas. Later the expeditions of these armed vessels came to be conducted under the authority of letters of marque granted by the sovereign of a maritime country, who assumed jurisdiction over the captures effected. This jurisdiction was further regularized by the establishment of a board, designated the "Admiralty." In England the Court of Admiralty appeared in the middle of the fourteenth century; the first recorded case of a judicial inquiry before the Admiral occurred apparently in 1357. In France the office of Admiral was created in the latter part of the fourteenth century, and in Scotland early in the fifteenth. With the gradual development of the law of

<sup>1</sup> Article 52.

<sup>2</sup> Article 58.

nations it became customary for the Admiralty of maritime belligerents to set up a special Court to investigate the legality of captures made by their warships or privateers. In this country an Order in Council of 1589 required all prizes to be submitted for adjudication to the High Court of Admiralty. The Court sat without a jury. For a long time its sessions were held at Doctors' Commons. It had two kinds of jurisdiction—prize and instance (the latter relating to the trial of actions for collision, salvage, etc.). Now the prize jurisdiction is assigned to the Probate, Divorce, and Admiralty Division of the High Court, from which appeal lies to the Judicial Committee of the Privy Council. The Naval Prize Bill, 1911, which was rejected by the House of Lords, had for one of its objects the replacing of the Judicial Committee of the Privy Council as an appellate tribunal by a special supreme Court, from which a further appeal would lie to an International Prize Court. The present procedure is regulated by rules made by the Privy Council, but where a case arises that is not covered by existing rules the President of the Court may make such rules of practice as he deems fit. The earlier antiquated procedure was considerably modified by the new rules of the Order in Council, August 5, 1914, whereby the mode of conducting the proceedings was assimilated to that of an ordinary civil action. Another important change is the abolition of prize money (by Order in Council, August 28), and the substitution for it of a prize bounty or head money. This is awarded by all States to their naval forces that capture enemy vessels—a notable exception being the United States, which abolished prize money in 1903.

All maritime Powers have their own Prize Courts in time of war. They partake more of the nature of municipal tribunals than of international; but generally they observe the laws of nations, though they are bound to submit to departures therefrom made by the sovereign authority of their respective States. According to a pronouncement of Lord Stowell, the presiding judge should administer impar-

tially that justice which the law of nations holds out without distinction to independent States. Prize Courts may be set up by belligerents in their own territory, in territory under their military occupation, or in that of an ally, but in the latter case permission must first be obtained. They may not be instituted in neutral territory. Any attempt to do so on the part of a belligerent, and connivance at or acquiescence on the part of a neutral would be a violation of neutrality. In an earlier chapter we referred to the case of Genêt, the French Minister in Washington, who, among other reprehensible acts, tried to set up consular prize courts in the United States (1793), and whose recall was therefore insisted on. This obligation was emphasized over a century ago by Lord Stowell,<sup>1</sup> and is now prescribed by a rule of the Hague Conference.<sup>2</sup>

Modern prize law is much milder towards the enemy than it was in Stowell's time. Now the presumptions as to the legitimacy of capture or destruction of prizes and the bias in favour of captors are less strong than they were formerly. Moreover, in order to meet innocent claims that cannot be substantiated by a strict interpretation of the law, a system of prize equity bids fair to be established and administered by our Prize Courts. Through the agency of the Procurator General acting—as has been well said—as the Keeper of the King's international conscience, the literal rigour of prize law may be relaxed in cases calling for equitable consideration.

(e) One more question remains that may conveniently be considered in this chapter, namely, the legal position of enemy combatants found on neutral vessels. At first the British Government, desiring to interfere as little as possible with neutral shipping, issued instructions to examining officers in the patrol service not to arrest small parties of enemy reservists in neutral vessels encountered on the high seas. But later, owing to the contrary action of the German Government, these instructions were rescinded, and enemy

<sup>1</sup> *The Flad Oyen*, 1 C. Rob. 185.

<sup>2</sup> H. C. (1907), No. xiii. Article 4.

aliens liable to military service were ordered to be removed from neutral ships on the high seas as well as in territorial waters. On November 1 the Foreign Office made the following announcement: "In view of the action taken by the German forces in Belgium and France of removing as prisoners of war all persons who are liable to military service, his Majesty's Government have given instructions that all enemy reservists on board neutral vessels should be made prisoners of war."

It was reported early in October that the United States Government made a protest against the action of British cruisers in removing from American vessels leaving American ports German and Austrian reservists, who were on their way to join the forces of their respective countries. The ground of complaint was that such interference amounted to a violation of the protection which the United States is entitled to extend to belligerent subjects. In a communication made in January by Mr. Bryan, the United States Secretary of State, it was stated that British warships had detained or searched two American vessels for German and Austrian subjects. He observed that in one of these cases a "vigorous representation" was made to the "offending Government." The other case, "where certain German passengers were made to sign a promise not to take part in the war," was "brought to the attention of the offending Government with a declaration that such procedure, if true, is an unwarranted exercise of jurisdiction over American vessels." With regard to this contention we may say that had the arrest been effected in American territorial waters, it would have been an unjustifiable proceeding involving a breach of neutrality and an affront to American sovereignty. But on the high sea the position is different; for there every neutral vessel, other than a warship, is liable to visit and search, so that in such circumstances no question of violating the rights of neutrality and sovereignty can arise, and the expression "offending Government" is out of place.

• *The Times*, January 26, p. 10.

Let us see, then, what is the position of neutral vessels engaged in carrying enemy combatants and intending combatants, and the position of enemy persons on board. First as to the vessels. During the war between Great Britain and Holland, 1807, an American merchantman, the *Orozembo*,<sup>1</sup> having taken on board three Dutch military officers of distinction, and also two civil officials, was captured by the British. Though the owner claimed that the master was ignorant of the service in which he was engaged, the condemnation of the vessel was pronounced on the ground that she had been employed at the time of capture in the service of the enemy, and for the purpose of transporting military persons to enemy territory. In the course of his judgment, Sir W. Scott said that a vessel hired by the enemy for the conveyance of military persons was regarded as a transport and therefore was subject to condemnation. The number of persons was not necessarily material; it might be a greater assistance to one belligerent and a greater danger to the other to carry a few persons of a higher position than many of a lower. The same principle might well apply to civil officials sent out by their Government on public service. Proof of knowledge on the part of the master was not essential—especially so as in the case in question the knowledge of the owner was proved. The essential point was the injury to the belligerent arising from the employment of the vessel; if the service of the vessel was injurious, it gave the belligerent a right to prevent that service from being carried out, or at least repeated, by enforcing the penalty of confiscation of the vessel.

This judgment sums up the British practice,<sup>2</sup> with which that of the United States is in substantial agreement. It may be added that if the enemy persons carried, even though possessing a military character, were merely travelling as private passengers at their own expense, the vessel would not on that account alone be liable to confiscation.<sup>3</sup>

<sup>1</sup> *The Orozembo* (1807), 6 C. Rob. 430.

<sup>2</sup> Cf. *Parliamentary Papers, Miscell.*, No. 4 (1909), p. 9.

<sup>3</sup> *The Friendship*, 6 C. Rob. 429. Cf. *Parliamentary Papers, ibid.*, p. 6.

Similar rules were adopted by other States. Thus, during the Russo-Japanese War, 1904-5, the Japanese captured the *Nigretia* which was on a voyage from Shanghai to Vladivostock, and condemned both the vessel and the cargo, because she had on board two Russian officers, travelling under assumed names, with the knowledge of the charterers.<sup>1</sup>

With regard to the position of enemy persons found on board neutral vessels, the Trent affair will serve as a good illustration. In 1861, during the American Civil War, the *Trent*, a British mail steamer, was on a voyage from Havanna to Nassau, with mails and passengers, among whom were two envoys from the Southern Confederacy proceeding to Great Britain and France respectively. She was intercepted by a United States warship, which removed the two envoys as prisoners. Thereupon the British Government, supported by other Powers, demanded and obtained their release. In the subsequent correspondence the United States Government disclaimed any right to seize noxious persons, whether rebels, criminals, or enemies, as such, from a neutral vessel on the high seas; but they urged that the envoys and their despatches were to be considered contraband of war, and on the same footing as naval and military persons. Therefore, the captain of the warship ought to have sent in the *Trent* for adjudication, when the fate of the persons on board would have been decided by diplomatic methods. However, as the American officer had released the vessel, his detention of the two envoys was unjustifiable. In reply, the British Government emphasized that the office and character of the persons did not make them contraband; for neutrals were entitled to maintain friendly relations in time of war with both belligerents, and may therefore carry their non-military public agents without any breach of neutrality.

The above principles have, with certain modifications, been adopted in modern conventions. We have already

<sup>1</sup> Takahashi, p. 689. The practice of other States is referred to in *Parliamentary Papers, Miscell.*, No. 5 (1909), pp. 108 *seq.*



referred to the tenth Convention of the Hague Conference,<sup>1</sup> which empowers a belligerent to seize enemy sick and wounded found on board neutral hospital ships and merchantmen. In the Declaration of London provision is made for the case of neutral vessels engaging in unneutral service, and for the position of enemy combatants carried in them. Articles 45 and 46 indicate certain offences on the part of neutral ships that will justify their being sent in for adjudication: for example, if they specially undertake a voyage for the transport of individual passengers embodied in the armed forces of the enemy, or if with the knowledge of the owner, charterer, or master, they are engaged in transporting a military detachment of the enemy. Article 47, which concerns us here more particularly, lays down that any individual embodied in the armed forces of the enemy, who is found on board a neutral merchantman may be made a prisoner of war, even though there be no ground for capturing the vessel. The expression "embodied in the armed forces of the enemy" appears to have given rise to doubt in some quarters. Does it apply only to officers and men already enrolled in a fighting unit, or does it include also reservists proceeding to their country in order to be enrolled? For practical purposes it would seem that there was scarcely an adequate ground for differentiating between the interception of men who have already joined the enemy's colours and the interception of men who are actually on their way to join the enemy's colours. However, the opinion of the Naval Conference—based no doubt on compromise rather than on logic—was that the provision in question does not apply to enemy subjects resident abroad who have been called upon to return to their country in order to take part in the hostilities, and who have not yet joined the corps to which they are to be attached.<sup>2</sup>

A case that occurred not long after the Declaration of London was formulated is that of the *Manouba*, a French liner, which, during the Turco-Italian War, was seized

<sup>1</sup> H. C. (1907), No. X, Article 12.

<sup>2</sup> *Parliamentary Papers, Miscell.*, No. 4 (1909), p. 58.

(January 1912) by an Italian cruiser, and sent into Cagliari for adjudication. There were on board a number of Turkish passengers who were suspected of being officers, but who claimed to be in the medical service. On the protest of the French Government the vessel was released and the suspected persons were committed to the charge of the French consul at Tunis, who agreed to prevent their crossing over into Tripoli if they were proved to be combatants. Eventually the seizure was found to be unwarranted, and Italy paid damages to France conformably to a decision of The Hague Court of Arbitration.

## CHAPTER XX

### MINES—THE NORTH SEA AS A MILITARY AREA— BLOCKADE—REPRISALS

ONE of the extraordinary features of the present war has been the practice of mine-laying, which has wrought such great havoc not only to vessels of the belligerents but also to the shipping of neutral countries. In no previous war was the practice adopted on such extensive lines and with such disastrous effects. The regular use of maritime mines, for defensive purposes, dates back about half a century to the time of the American Civil War, 1862-5, when ships belonging to the Northerners were sunk by means of these unseen, treacherous instruments of warfare. They were also employed in the Franco-German War, 1870-1, in the Russo-Turkish War, 1878, in the Spanish-American War, 1898, and in the Russo-Japanese War, 1904-5.

Submarine mines are of two kinds. First, there are the electrical or controllable mines, which are fired by an electric wire from the shore as soon as the enemy's ships are seen crossing the mine-field. As these are too costly and can only be worked at a short distance from the shore, they are falling into disuse. Then there are the mechanical or uncontrollable mines, or, as they are called officially, automatic submarine contact mines. These are the terrible engines that have been dealing death and destruction to men and ships. They are comparatively cheap and can be laid rapidly. They can be anchored to the bottom and kept at any depth below the surface, or they can be placed in the water unanchored and allowed to float anywhere. There is, indeed, no certainty that even such as are at first moored will not get loose;

experience has shown that a heavy sea can easily break them adrift, and carry them into the paths of passing vessels. Clearly, no other instrument of warfare needed more careful regulation for use in belligerent operations than the sea mine. The great sufferings inflicted by this means in the Russo-Japanese War on combatants and neutrals alike, showed the world that it was absolutely necessary to establish international legal provisions on the subject.

The question was therefore brought before the Hague Conference of 1907, and a good deal of attention was devoted to it. The "emasculated Convention"—as it was termed by the late Professor Westlake—which the Congress of States eventually arrived at, is one of its least satisfactory productions. In the preamble the Conference declared itself "inspired by the principle of the freedom of the seas as the common highway of all nations," and stated that its aim was to lessen the rigours of warfare and protect peaceful commerce. But this aim was not realized. In the first place, the rules laid down are unsatisfactory in themselves; secondly, they were made only provisional, for it was agreed that the subject should be taken up again six and a half years later.

The regulations agreed upon are to the following effect: Unanchored automatic contact mines may not be used unless they are so constructed that they will become harmless within one hour at most after they have been laid. Nor may anchored mines be laid which do not become harmless as soon as they have broken loose from their moorings. Torpedoes which do not become harmless after they have missed their mark are not to be used.<sup>1</sup> Mines may not be laid off the enemy coasts and ports with the sole object of intercepting commercial navigation.<sup>2</sup> (The insertion of the word "sole" is to be noted; it suffices in itself to make this rule altogether illusory. A naval commander can always allege some other object—for example, that the port contains a warship no matter how old and ineffective it may be, or that an enemy cruiser may enter, though the possi-

<sup>1</sup> H. C. (1907), No. VIII, Article 1.

<sup>2</sup> Article 2.

bility be distant, and so on.) Further, every precaution must be taken for the security of peaceful navigation. Anchored mines are to be so constructed that they must become harmless after a limited time has elapsed; and when they have ceased to be under surveillance, belligerents must give notice of the danger as soon as military exigencies permit.<sup>1</sup> (Here the weak point is the vagueness and precarious character of the last phrase; by appealing to it an unscrupulous foe would always be in the position to justify many sins of omission; therefore as there is no definite time limit within which such mines are to become innocuous, this rule, too, becomes practically nugatory.) Finally, there is a provision as to removing mines at the close of the war.<sup>2</sup>

It is obvious from the above rules that the principal defect of the Convention is the absence of provisions forbidding the laying of mines on the high seas, at all events subject to such clearly defined exceptions as might seem indispensable. Consequently, neutral shipping either on the high seas or in the narrow straits remains exposed to great peril; and the freedom of the seas—the great international highways of commerce to which neutrals have as much right as belligerents—is a principle which unrestricted mine-sowing will do much to destroy.

At the Hague Conference the British delegates urged that the use of unanchored mines or any other mines that do not become harmless as soon as they get loose should be prohibited, and also that none should be allowed save in the territorial waters of the belligerents, or within a distance of ten miles from the shore batteries of a naval station. On one occasion during the proceedings of the Congress one of the German representatives suggested, instead of a permanent rule, that no floating mines should be used at all for a period of five years. Great Britain dissented from the proposal, which plainly indicates that Germany thought the occurrence of war unlikely within that period—at all events war in which she would be engaged. However, after the Conven-

<sup>1</sup> Article 8.

<sup>2</sup> Article 5.

tion as it now stands had been voted on, Sir Ernest Satow emphasized in a noteworthy statement, which it is necessary to recall in view of the character of the present hostilities, that there are binding rules of international law applicable to the subject irrespective of the few provisions that were expressly made by the Conference. ". . . The British delegation," he observed, "desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the Convention of the right of neutrals to protection, nor of humanitarian sentiments which cannot be neglected; it has done all that is possible to bring the Conference to share its views, but its efforts in this direction have remained without result. The high seas, gentlemen, are a great international highway. If in the present state of international law and custom belligerents are permitted to fight their battles there, it is none the less incumbent on them to do nothing which might, long after their departure from a particular place, render this highway dangerous to neutrals who have an equal right to use it. We declare without hesitation that the right of the neutral to security of navigation of the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war." He went on to insist on the serious results of mine-laying, and that it was necessary to restrict the field of action of these mines—a restriction that would be to the advantage of the civilized world, that would diminish the causes of armed conflicts, and avoid disturbance of friendly relations between neutrals and belligerents. "As . . . this constitutes only a partial and insufficient solution of the problem, it cannot . . . be regarded as a complete exposition of international law on the subject. Therefore the legitimacy of a given act cannot be presumed for the mere reason that the Convention has not forbidden it."

To this statement, the German delegate, Baron Marschall

<sup>1</sup> *Parliamentary Papers, Miscell.* No. 4 (1908), p. 54.

von Bieberstein, replied, professing benevolent intentions and high motives on the one hand, and defending the claims of military necessity on the other. (These extravagant German claims of military necessity we have already discussed in a previous chapter.)<sup>1</sup> We cannot help saying that the German representative's observations, that were made on this memorable occasion, constitute a masterpiece of subtlety at once conciliating in their tone and evasive and non-committal in their underlying significance. He admitted that a belligerent who lays down mines assumes a very heavy responsibility towards neutrals and towards peaceful shipping; and he thought that no one would resort to such means unless demanded by military reasons of an absolutely urgent character. He went on to argue that military operations are governed not only by the principles of international law, but also by the dictates of conscience, good sense, and humanity; he solemnly declared that his countrymen when called to war would always fulfil the unwritten law of humanity and civilization, and he particularly emphasized that in the sentiments of humanity and civilization no State was superior to his own.<sup>2</sup> Whilst these proclamations of lofty motives and principles were made by the German delegate to the assembled representatives of the world, salutary measures of reform suggested by others were at the same time strenuously opposed by him. However, let us see how these high professions have been carried out in this war.

On August 23, 1914, the following statement was issued by the Press Bureau: "The Admiralty wish to draw attention to their previous warnings to neutrals of the danger of traversing the North Sea. The Germans are continuing their practice of laying mines indiscriminately upon the ordinary trade routes. These mines are not laid in connection with any definite military scheme, such as the closing of a military port, or as a distinct operation against a fighting fleet, but appear to be scattered on the chance of catching individual British war or merchant vessels.

<sup>1</sup> See Chap. II.

<sup>2</sup> See *supra*, Chap. IX, *in init.*

In consequence of this policy neutral ships, no matter what their destination, are exposed to the gravest dangers. Two Danish vessels, the steamship Maryland and the steamship Broberg, have within the last 24 hours been destroyed by these deadly engines in the North Sea while travelling on the ordinary routes at a considerable distance from the British coast. In addition to this it is reported that two Dutch steamers, clearing from Swedish ports, were yesterday blown up by mines in the Baltic. . . . The Admiralty, while reserving to themselves the utmost liberty of retaliatory action against this new form of warfare, announce that they have not so far laid any mines during the present war and that they are endeavouring to keep the sea routes open for peaceful commerce."

This announcement appears to have been contradicted by a German statement; but actual facts furnished incontrovertible evidence of the truth of the announcement. The German mines were constantly being gathered by British sweepers from the North Sea and the Atlantic routes. It is probable that these mines were not "floating" mines, which are forbidden by the Hague Convention; they were presumably anchored mines. But when the latter are laid in deep water and on a shifting bottom, they are liable to be torn from their moorings and cast adrift, and so they would present all the dangers of floating mines. There were several reports that mines were laid by German vessels disguised as trawlers or neutral traders. No time was lost in this sinister enterprise, which began as soon as war was declared. Already in August many vessels were blown up; five were sunk off the north-east coast; British trawlers engaged in mine-sweeping were destroyed. Some mines were found at a distance of thirty miles off the Tyne breakwater. On August 27 a Norwegian steamer and a Danish trawler were sunk; the following day other casualties occurred. About the same time an Iceland trawler was sunk twenty-six miles off the Tyne. On September 5 the Pathfinder, a British cruiser, and the Wilson liner Runo were both struck by mines twenty miles from the east coast.



Neutral shipping suffered most, for the mines were strewn indiscriminately on the high seas, as much as thirty miles away from the shore, not as part of any definite military operations, nor by German ships of war, but by German trawlers. Moreover, the German authorities published no information as to the mines they laid and their localities, nor did they take any measures whatever for safeguarding neutral shipping.

On October 2 an announcement was made by the Admiralty to the effect that owing to this wanton conduct, Great Britain was obliged in her self-defence and by way of retaliation to resort to the use of mines in the southern areas of the North Sea. Their position was indicated, and regulations were made for the safety of neutral merchantmen.

In the middle of October the Russian authorities were compelled to adopt similar measures in the Baltic. The following statement was issued, under date Petrograd, October 17: "In view of the presence of German submarines at the entrance to the Gulf of Finland, and the placing by the enemy of booms and torpedoes near the Russian coast, the Imperial Government announces that the Russian naval authorities are compelled in their turn to have recourse largely to similar steps. Consequently navigation in the north zone bounded by the Russian coast by parallel 58 deg. 50 min. North lat., and by the meridian 21 deg. East long. is to be regarded as dangerous. As is the entrance to the Gulf of Riga and the coast waters of the Aland archipelago. In order that persons not taking part in the hostilities may not run the risks of war, the entrances and exits of the Gulf of Finland and Riga are to be regarded as closed from the moment of the announcement."

The mines laid by the Austrians in the Adriatic did not satisfy the requirements specified in the Convention, scanty as those requirements are. Italy made representations to the Austrian Government which undertook to adopt measures for preventing a recurrence of injuries to neutral

shipping by fixing the mines more securely, and by removing the old and defective ones.

Despite representations, complaints, and protests German activities in sowing the high seas with these treacherous engines of destruction showed no signs of abatement. Probably the German Government held in this case, as they have held in the case of other Conventions, that the rules drawn up by the Hague Conference did not apply in the present war. It is true Article 7 says that the provisions of the Mines Convention are applicable only as between the contracting Powers, and only if all the belligerents are parties to it. Russia did not sign the Convention. Therefore it would seem that Germany considered herself exempt from all the obligations it imposed, and so entitled to resort to the most ruthless, indiscriminate, and unrestrained methods of slaughter. But, independently of this conventional law—and this point cannot be emphasized too strongly—there is a common law of nations appertaining to the high seas. There are long-established rules of international law which confer on all nations the right to sail the high seas free from obstructions and dangers due to the deliberate, indefensible practices of this or that State. There are the demands of the public conscience, as repeatedly declared and insisted on by the Hague Congresses. The absence of a written law or the non-ratification of an express provision by no means implies a condition of unmitigated licence and anarchy. Written laws are but special applications, or crystallizations, of general principles which are inherent in the moral conscience and the juridical consciousness of civilized mankind. A code of legal provisions is but an elaboration of these fundamental principles, an edifice, necessarily based on these ineradicable foundations. Therefore, whatever havoc unconscionable wreckers may inflict on this uprisen edifice, its foundations remain—a perpetual witness to the fact that reasonable beings cannot avoid distinguishing between good and bad, between right and wrong. These basic principles, these dictates of conscience, these requirements of humanity—call them what

we will—cannot be violated with impunity, even though there be no clearly prescribed sanctions in the form of definite penalties for their infringement. And all these principles of conduct, which are the very breath and essence of law, Germany has violated by her reckless, indiscriminate methods of mine-laying, as well as by other lawless proceedings.

Now, when one belligerent persists in lawless and unprincipled proceedings, it would be sheer madness on the part of the adversary to adopt a policy of acquiescence or tacit disapproval. If self-preservation cannot be secured on the one side and decent conduct enforced on the other but by retaliatory measures, then such measures are perfectly justifiable and legitimate when they are applied with no more rigour than the exigencies of the occasion demand. The drastic step, then, taken by the British Government in declaring the North Sea a military area is amply justified by the circumstances; indeed, the action would by no means have been unwarranted had it been taken at a much earlier date. On November 2 the Secretary of the Admiralty made the following announcement: "During the last week the Germans have scattered mines indiscriminately in the open sea on the main trade route from America to Liverpool *via* the North of Ireland. Peaceful merchant ships have already been blown up with loss of life. The White Star liner *Olympic* escaped disaster by pure good luck. But for the warnings given by British cruisers, other British and neutral merchant and passenger vessels would have been destroyed. These mines cannot have been laid by any German ship of war. They have been laid by some merchant vessel flying a neutral flag, which has come along the trade route as if for the purpose of peaceful commerce and which, profiting to the full by the immunity enjoyed by neutral merchant ships, has wantonly and recklessly endangered the lives of all who travel on the sea, regardless of whether they are friend or foe, civilian or military in character. Mine-laying under a neutral flag and reconnaissance conducted by trawlers, hospital ships, and neutral vessels are the ordinary features

of German naval warfare. In these circumstances, having regard to the great interests entrusted to the British navy, to the safety of peaceful commerce on the high seas, and to the maintenance within the limits of international law of trade between neutral countries, the Admiralty feel it necessary to adopt exceptional measures appropriate to the novel conditions under which this war is being waged. They therefore give notice that the whole of the North Sea must be considered a military area. Within this area merchant-shipping of all kinds, traders of all countries, fishing craft and all other vessels, will be exposed to the gravest dangers from mines which it has been necessary to lay, and from warships searching for suspicious craft. All merchant and shipping vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty directions." Then followed certain general directions as to the courses to be taken by merchantmen.

The legitimacy of closing the North Sea has been questioned in some quarters. Though the high seas are open and free to all in time of war, as well as in time of peace, yet their use by neutrals in time of war is subject to various restrictions. We have already shown that neutral vessels are liable in case of suspicious circumstances to be intercepted by belligerent warships, and to be searched in order to determine the true character of their cargoes and whether they are engaged in unneutral service. Liabilities are also imposed on them in case they should attempt a breach of blockade, and the area within which they may be captured for such violation of belligerent right is by no means clearly defined. Considering modern conditions of warfare, the rapidity of movement and communication, the great firing range, etc., the area may certainly be a rather extensive one. In any case, whatever the extent of the blockaded area may legitimately be — and it depends mainly on the magnitude of the forces employed — there is no doubt that international law requires neutral vessels to keep away from it, under penalty of capture and con-

demnation. Again, neutral vessels venturing forth in the vicinity of localities where naval operations are being conducted incur great risks. It is their duty to keep away from the scene of battle. If they should suffer injury there—as a Norwegian merchantman did during the action in the Bight of Heligoland—none of the belligerents can be held answerable. Further, the belligerent right of interference with neutral vessels is still more enlarged when the presence of the latter within more or less undefined regions might be deemed prejudicial to the secrecy of the preparations and movements of warships. All these rights on the one side and obligations on the other necessarily imply that a belligerent is empowered to exercise temporarily supreme dominion over greater or lesser tracts of the ocean. When there is a conflict between the fundamental rights of a belligerent to ensure his safety and his very existence and the rights of a neutral State to sail the high seas in pursuance of its commercial interests, the latter must, when exceptional circumstances arise, give way to the former. Neutral vessels, moreover, might well be in a position to alter that course for a time, whereas it might obviously be impossible for a belligerent fleet to adjust its movements and adapt its plans to meet the needs of the merchantmen of other countries. It follows, then, that on principle as well as under long-established practice, certain areas may be pronounced to be of a strategic character and therefore closed to neutrals; and the limits of such areas naturally depend on the particular circumstances of each case. So far as the North Sea is concerned, the conditions under which the present war is waged, the number of countries involved, the great interests at stake, the wild lawless methods of warfare adopted by Germany, her indiscriminate laying of mines in the open sea, her deliberate attacks on merchantmen without providing for the rescue of persons on board, and the threats to redouble her ruthless ferocity—all these circumstances co-operate to confer a right on Great

Britain to close the North Sea as a military area both in her own interests and in the interests of neutrals themselves.

It may be said that this action introduced a new species of blockade, rendered both possible and necessary on account of the great part played by mines and submarines in the present war. However this may be, Germany declared, by way of retaliation, the whole of the seas surrounding the British Isles to be areas of war. In the Memorandum dated Berlin, February 4, 1915, after setting forth various violations of international law on the part of Great Britain—for example, the attitude adopted towards contraband, the repudiation of many articles of the Declaration of London, the disregard of the Declaration of Paris in seizing German non-contraband goods on neutral vessels, and the conversion of the North Sea into a military area—the German Government then made the following declaration: “To its regret it therefore sees itself forced to military measures aimed at England in retaliation against the English procedure. Just as England has designated the area between Scotland and Norway an area of war, so Germany now declares all the waters surrounding Great Britain and Ireland, including the entire English Channel, as an area of war, thus proceeding against the shipping of the enemy. For this purpose, beginning from February 18, it will endeavour to destroy every enemy merchant ship that is found in this area of war without its always being possible to avert the peril that this threatens persons and cargoes. Neutrals are therefore warned against further entrusting crews and passengers and wares to such ships. . . . At the same time it is especially to be noted that shipping north of the Shetland Islands, in the eastern area of the North Sea, and in a strip of at least thirty sea miles in width along the Netherlands coasts is not imperilled. The German Government gives early notice of these measures so that hostile as well as neutral ships may have time to adopt plans accordingly. . . .”

If this pronouncement was intended to be a declaration

of blockade to take effect on February 18, then it is quite obvious that it could be no more than a "paper" blockade. Germany did not possess the naval resources necessary to maintain an effective blockade in the seas surrounding Great Britain and Ireland. Nor could she at this juncture of the war establish what may be called a quasi-blockade by means of scattering mines in those waters; for mines may be gathered by any passing vessel and freedom of navigation re-established, if her warships be not present to prevent such action. The Memorandum, quoted in part above, contains certain particulars required by international law<sup>1</sup> for the purpose of instituting a blockade. It makes the necessary declaration, and notifies it to the neutral Powers. It states when it will begin, the limits of the coasts to be blockaded, and how long neutral vessels will be allowed in order to come out. No time is fixed by international law; but a reasonable amount of time is necessary. Very frequently a fortnight's delay has been allowed, as is the case under British practice; and this is the delay allowed by Germany in the present case. Even though all these and other conditions be fulfilled, yet a blockade cannot be regarded as binding unless it is effective, that is unless it is maintained by a sufficient force which is really able to prevent any approach to a departure from the enemy coast, and expose to danger and probable capture any neutral vessel attempting to get through. If no such adequate force is present, the alleged blockade is no real blockade at all. To proclaim it on the chance of capturing here and there a neutral vessel, so that other neutral merchantmen may cease making voyages to British ports, is illegitimate. Indeed, failing an effective blockade, any forcible interference with a neutral vessel that has no contraband and is not engaged in unneutral service will constitute an act of war against the neutral State concerned.

This threatened procedure on the part of Germany has been generally characterized as piracy. Though, if carried

<sup>1</sup> Cf. the Declaration of London, Articles 1-21.

out, it will amount to a flagrant breach of international law and a crime against the entire society of States, it will not be piracy in the sense contemplated by the law of nations. In this sense piracy is an act of depredation or violence committed on the high seas by a private vessel without authorization from any State.<sup>1</sup> Any acts committed by German public vessels in pursuance of their Government's declaration would not, obviously, fall within this definition. However, whether the threatened acts would amount to piracy or not, the German threat was described in many quarters—not only in Great Britain—as a ridiculous piece of bluff, an outburst of temper and bravado, a stroke of barbarism, a brutal and lawless act of aggression, an act of desperation, and so on.

On February 12 the United States Government instructed their Ambassador at Berlin to present a Note of protest to the German Government. It referred to the alleged blockade, and the threats involving as they did neutral as well as enemy vessels: "It is, of course, not necessary to remind the German Government," it went on to say, "that the sole right of a belligerent dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise the right to attack or destroy any vessel entering the prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it. Possible suspicion that enemy ships are using a neutral flag improperly can create no just presumption that all ships traversing the prescribed

<sup>1</sup> Cf. *United States v. Smith* (1820), 5 Wheaton 158, where various definitions of piracy are given. See also the case of the *Shenandoah*, the confederate cruiser, in the American Civil War. (*British Parliamentary Papers*, British case presented to the Geneva Court of Arbitration, 1872, pp. 156-60.)



area are subject to the same suspicion. It is to determine exactly these questions that this Government understand the right to visit and search to have been recognized."

The British reply to the German declaration was bound to follow sooner or later. On March 1 the Prime Minister read the following statement in the House of Commons:—

"Germany has declared that the English Channel, the north and west coasts of France, and the waters round the British Isles are a war area and has officially notified that all enemy ships found in that area will be destroyed and that neutral vessels may be exposed to danger. This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft on these waters the attack can only be delivered by submarine agency.

"The law and custom of nations in regard to attacks on commerce have always presumed that the first duty of the captor of a merchant vessel is to bring it before a Prize Court, where it may be tried, and where the regularity of the capture may be challenged and where neutrals may recover their cargoes. The sinking of prizes is in itself a questionable act, to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew or passengers, if there are passengers on board. The responsibility for discriminating between neutral and enemy vessels and between neutral and enemy cargo obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo and to preserve all papers before sinking or even capturing the ship. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation on every belligerent.

"It is upon this basis that all previous discussions of the law for regulating warfare at sea have proceeded.

"The German submarine fulfils none of these obligations. She enjoys no local command of the waters in which she operates. She does not take her captures within the juris-

diction of a Prize Court. She carries no prize crew which she can put on board the prizes she seizes. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew of the vessels she sinks; her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war.

"The German declaration substitutes indiscriminate destruction for regulated capture. Germany is adopting these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving the British Isles or Northern France.

"Her opponents are therefore driven to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany. These measures will, however, be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant lives and in strict observance of the dictates of humanity.

"The British and French Governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin.

"It is not intended to confiscate such vessels or cargoes unless they would be otherwise liable to confiscation. Vessels with cargoes which have sailed before this date will not be affected."

The above statement of the British Government was followed by an Order in Council, March 11, 1915, which, after referring to the German declaration of February 4, and to the consequent right of retaliation, indicated further measures for preventing any commodities whatever from reaching or leaving Germany, though without risk to neutral ships and neutral and non-combatant persons. The provisions are as follows:—

"I. No merchant vessel which sailed from her port of

departure after the 1st of March, 1915, shall be allowed to proceed on her voyage to any German port.

" Unless the vessel receives a pass enabling her to proceed to some neutral or Allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not being contraband of war, shall, if not requisitioned for the use of his Majesty, be restored by order of the Court upon such terms as the Court may in the circumstances deem to be just to the person entitled thereto.

" II. No merchant vessel which sailed from any German port after the 1st of March, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.

" All goods laden at such port must be discharged in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of his Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just.

" Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

" Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper Officer of the Crown.

" III. Every merchant vessel which sailed from her port of departure after the 1st of March, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or Allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the

use of his Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

“Provided that this Article shall not apply in any case falling within Articles II or IV of this Order.

“IV. Every merchant vessel which sailed from a port other than a German port after the 1st of March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of his Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court, and dealt with in such manner as the Court may in the circumstances deem to be just.

“Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

“Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper Officer of the Crown.

“V. (1) Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war) placed in the custody of the Marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper Officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

“(2) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order.

“VI. A merchant vessel which has cleared for a neutral port from a British or Allied port, or which has been allowed

to pass having an ostensible destination to a neutral port, and proceeds to an enemy port, shall, if captured on any subsequent voyage, be liable to condemnation.

"VII. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order.

"VIII. Nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in Germany or belonging to German subjects shall enjoy the protection of its flag."

It is to be noted that these restrictive measures were made to apply only to Germany; for nothing is said of Austria-Hungary and Turkey. Though the term "blockade" is not mentioned, the provisions laid down virtually establish a blockade of the German coasts, subject to certain relaxations. As Sir Edward Grey stated, in the course of correspondence between him and the American Ambassador in London: "His Majesty's Government have felt most reluctant at the moment of initiating a policy of blockade to exact from neutral ships all the penalties attaching to a breach of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargo, which belligerents have always claimed, in breaches of blockade. They restrict their claim to the stopping of cargoes designed for or coming from the enemy's territory." He pointed out also that it was not intended to interfere with neutral vessels carrying enemy cargo of non-contraband nature outside European waters, including the Mediterranean. Moreover, he suggested that the practice of stopping food to enemy civilians as a legitimate method of bringing pressure to bear on the enemy is supported by the two great German authorities, Bismarck and Caprivi. In 1885, at Kiel, Bismarck observed: "The measure has for its object the shortening of the war by increasing the difficulties of the enemy, and is a justifiable

step if impartially enforced against all neutral ships." In 1892 the German Chancellor, Caprivi, said in the Reichstag: "Private introduction of provisions into Paris was prohibited during the siege, and in the same way a nation would be justified in preventing the imports of food and raw produce." Finally, Sir Edward Grey emphasized that the British reprisals were "a natural and necessary consequence of the unprecedented methods, repugnant to all law and morality, which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating."

## ADDENDUM.

We must briefly record here additional facts which show that the Germans have gone on extending their sinister catalogue of violations of law. They have, by means of their submarines, indiscriminately sunk numerous neutral vessels and British fishing-boats; they have attempted to sink mail steamers, and torpedoed the *Falaba* which carried mails; their Prize Court at Hamburg refused to allow compensation to the owners of neutral cargo destroyed on the British steamer *Glitra*; and now (May 7) they have torpedoed the *Lusitania* (resulting in the loss of more than 1,100 innocent lives, including a large number of neutrals) in circumstances that make this deed the foulest and most dastardly crime against the international law of the States of the World, and against the civilization of mankind.

## CHAPTER XXI

### CONCLUSION—FUTURE OF INTERNATIONAL LAW

IN the preceding chapters we have referred to many customs and conventions of the law of nations, and we have considered relatively to these many of the proceedings and practices that occurred in the present war. We have seen to what extent international law has stood the stress and strain in the conflict of belligerent interests; we have noted numerous signal violations that were from the very beginning of the war committed by the German armies in Belgium and France, and by the German naval forces at sea. We have set forth breaches of law relative to the invasion of Belgium and Luxemburg, the violation of neutrality, the refusal to recognize certain legitimately enrolled combatants, the system of terrorism; the bombardment on land, naval and aerial, of undefended places; the indiscriminate destruction and devastation of towns and villages; the deliberate attacks on protected buildings, such as cathedrals and other churches, museums, libraries, hospitals, private dwellings; the unrestrained outrages on the civil population, including women and children; the forcing of civilians to give information, to act as screens against the attacks of their own soldiers, and to perform various prohibited services; the use of dum-dum and explosive bullets, the use of asphyxiating gases, the poisoning of wells, the hurling of blazing petrol; the disregard of the white flag; the abuse of the Red Cross; the illegitimate ruses of war; the lawless application of the arbitrary principle of "war treason"; the exorbitant requisitions and contributions, the seizure of

private property, pillage; the arrest and ill-treatment of hostages, the imposition of collective penalties, the excessive severity and unprecedented arrogance of the commanders and armies during the occupation of their adversaries' territory; the shooting of prisoners of war and wounded, the attack on a hospital ship; the attack on merchantmen without providing for the security of those on board, the destruction of fishing-vessels; the indiscriminate laying of mines on the high sea, the unwarranted extension of the maritime area of war, implying illegal interference with neutral shipping, and other contraventions of international law.

The list of offences is indeed a long one. No belligerent in the past could have resisted the temptation to exact the most violent reprisals for all this grave misconduct. Nowadays, the adoption of retaliatory measures in kind is increasingly repugnant to the conscience of the civilized world and to the spirit of law. To men carried away by their feelings of vindictiveness, to men incapable of restraining the promptings of indignation aroused by the heinous offences of malefactors, the application of a lynch law seems acceptable. But all self-respecting men and communities who pay some homage to reason cannot abandon themselves thus to a procedure that will avail little to obliterate crimes already committed, to bring back the fallen, to heal the maimed and wounded, to restore to those dispossessed of their belongings what was theirs. Of what avail will a general rigorous retribution be to vindicate law and order, and the plighted troth of international treaties and declarations? How will it profit the interests of the society of States? A criminal in a given civilized community is punished in accordance with its prevailing legal provisions. An offender against the law of the society of States should, properly, be punished in accordance with the fundamental principles underlying that law. It is true that here no definite prescriptions exist for the adjustment of penalty to offence; but the spirit of international law and the dictates of the moral consciousness of mankind are alike adverse to the adoption



of all stringent proceedings that are animated by hate and cannot but engender still greater hate, that banish all considerations of mercy and cannot but beget still greater feelings of bitterness and cruelty. When a belligerent uses unscrupulous methods of warfare, commits unspeakable horrors, and regards with contempt the provisions of international law, the best and the worthiest reply of the adversary is—if consistent with his safety—to conform all the more resolutely to the requirements of the law, and observe with all the greater determination the decencies expected of humane and enlightened men. At the end of the war, when an unconscionable and law-breaking belligerent is reduced to submission, due retribution exacted conformably to justice can be visited on the authors of, and those responsible for, all the violations that were committed and all the atrocities that were perpetrated. The fundamental principles of justice—never separable from a sane will—can readily provide the penalties which international law has failed to prescribe. The victors can then, too, impose on the vanquished the necessary pecuniary indemnities, can introduce desirable alterations and readjustments in their territorial and political systems, with a view to securing future stability and greater harmony in the family of nations, and can insist on certain limitations as to armaments and military and naval policy generally. It is better, if it be possible, to reform an offending State than to seek to crush it entirely. May future generations, when they read the records of history, learn that at one time there was a colossal upheaval in the world in the form of an unparalleled war, and that certain nations who had been sorely sinned against steadfastly preserved moderation in the conduct of their hostilities, paid heed to the provisions of law, refused to soil their hands by committing brutal and inhuman acts despite those perpetrated by their opponents, and that in the hour of victory—all the more glorious when attained by fair and honourable methods—whilst taking necessary measures for preventing the repetition of offences against the sacred laws of humanity, they showed themselves actuated by feelings of generosity.

If this war, whatever be the sufferings it has inflicted on the world, should succeed in purging away the evil desires of nations, in eradicating all pugnacious militarism and in setting up a more united and harmonious community of States recognizing and submitting to international law, an inestimable good will have been accomplished and a splendid heritage bequeathed to our successors. In order that law and right, in the relationships of States, may be enabled to triumph over anarchy and brute force, the nations of the world must necessarily be bound together more closely by some kind of federal system, subject to a reinvigorated federal law that shall be fortified by sanctions more authoritative and more potent than those that have hitherto been applied to safeguard the law of nations. Then would international politics assume a more salutary tone, diplomacy would be deprived of much of its tortuous subtlety, and international law would acquire greater vitality and command greater homage.

Kant, discussing the dependence of peace on a free federation of sovereign States, observes: "The condition of a law of nations being possible at all is that, in the first place, there should be a law-governed state of things. If this is not so, there can be no public right, and all right that we can think of outside the law-governed State—that is to say, in the state of nature—is mere private right. . . . Something of the nature of a federation between nations, for the sole purpose of doing away with war, is the only rightful conditions of things reconcilable with their individual freedom. . . . And the legitimate basis of all politics can only be the establishment of this union in its widest possible extent. Apart from this end, all political sophistry is folly and veiled injustice. Now this sham politics has a casuistry, not to be excelled in the best Jesuit school. It has its mental reservation, as in the drawing up of a public treaty in such terms as we can, if we will, interpret when occasion serves to our advantage. . . . Secondly, it has its probabilism, when it pretends to discover evil intentions in another, or makes the probability of their future ascendancy a lawful reason for bringing about the

destruction of other peaceful States. Finally, it has its philosophical sin, which is that of holding it a trifle, easily pardoned, that a smaller State should be swallowed up, if it be to the gain of a much more powerful nation. . . .”<sup>1</sup>

International law has suffered a great deal in the present war; it has been trodden upon and seriously bruised. But it has by no means been crushed. Its future need not be despaired of. With the conclusion of peace a brighter day will surely dawn for it. The nations, by their chosen delegates, will meet again in solemn conference for their work of reconstruction; their conscience, political and juridical, will have been much purged by the world-wide manifestations of pity and terror. They will then be enabled to co-operate with greater zest, with greater freedom, and with greater candour for the common cause of the world. Their deliberations must then be less dominated by the sinister spirit of militarism and the tyrannical exigencies of belligerent interests. They will have to realize that peace and not war is the normal condition of nations. Their conclusions will be embodied in Conventions, more definite, more precise, more forcible, less ambiguous, and less susceptible of evasion. In order to achieve this object, the representatives of the States must be appointed by reason of their distinguished public virtue, their sincere love of peace and humanity, their profound respect for law and order, and not because of their cunning in diplomacy, or skill in military organization. The new conventions that they will institute and the old conventions that they will renew must, together with the long-established customary law of nations, be so fortified and their sanctions made so strong through the jurisdiction of a world tribunal, that the evil consequences following their violation will outweigh the gain expected from their breach. Only by such a consummation will a fairer world arise, and a true community of States come into existence. International law, which has of late been bowed down by so many grievous burdens, will then be revived and will assume its rightful dominion.

<sup>1</sup> *Essay on Perpetual Peace* (1795). (English translation by Miss Campbell Smith, pp. 192-4.)

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